

7652

Nos. 12,597 and 12,607

United States Court of Appeals
For the Ninth Circuit

HARRY RENTON BRIDGES, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeals from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

GLADSTEIN, ANDERSEN & LEONARD,
NORMAN LEONARD,
VINCENT W. HALLINAN,
JAMES MARTIN MACINNIS,
240 Montgomery Street, San Francisco 4, California,
Attorneys for Appellants.

JUL 16 1951

PAUL J. JENNEN

CLERK

Subject Index

	Page
Introductory statement	1
Jurisdiction	9
Statutes involved	9
Questions presented	13
Specification of errors	16
Background of the case	47
Summary of argument	65

Point I.

The statute of limitations outlaws this prosecution (Specification of Errors 1-3)	66
The problem	66
Summary of argument	68
Argument	72
I. The Suspension Act is not applicable to this case	72
A. Its history and judicial interpretation demonstrate that the Suspension Act is not applicable unless intent to defraud the United States and pecuniary or property loss to the United States are elements of the offense charged	73
(1) Background of the Suspension Act.....	73
(2) Necessity of the presence of intent to defraud as an element of the offense as a condition of the applicability of the Suspension Act	76
(3) Necessity of the presence of pecuniary or property loss to the United States as an element of the offense as a condition of the applicability of the Suspension Act	80
B. The cases in which the Suspension Act has been held to toll the statute of limitations all	

	Page
involve an intent to defraud the United States and pecuniary loss to the United States	88
C. The elements of intent to defraud the United States and pecuniary or property loss to the United States are not essential elements of the crimes charged in the indictment at bar....	92
(1) Count 1 of the indictment.....	92
(a) Intent to defraud the United States	92
(b) Pecuniary or property loss to the United States	93
(2) Counts 2 and 3 of the indictment.....	94
(a) Intent to defraud the United States	94
(b) Pecuniary or property loss to the United States	94
D. The court below erroneously concluded that the Suspension Act was applicable to this prosecution	95
(1) The trial court erroneously applied United States v. Gilliland to the case at bar	96
(2) The trial court erroneously failed to apply Marzani v. United States to the case at bar	100
(3) The trial court erred in its reliance upon United States v. Gottfried, since that case is not apposite to the situation at bar...	111
(a) The offense involved in the Gottfried case was different from those here involved	111
(b) The Gottfried case cannot be controlling because its facts are so different from those at bar	112
(c) The court in the Gottfried case clearly committed at least two demonstrable errors	115

Page

(d) The court which decided it has since distinguished the Gottfried case from the situation here presented	119
E. Conclusion as to the applicability of the Suspension Act	120
II. Section 21 of the Act of June 25, 1948, does not "save" this prosecution from the operation of the statute of limitations	121
A. The legislative history of the revision of the Criminal Code of the United States.....	123
B. The legislative history of 18 U.S.C.A. 3282—the three-year statute of limitations.....	130
C. The legislative history of Section 21 of the Act of June 25, 1948	133
D. The words used in Section 21 have no application to statutes of limitations.....	135
E. Enacting Section 21 is not the proper way to save a period of limitations; Congress knew the proper method but did not use it in this case	138
F. Conclusion as to the inapplicability of Section 21 of the Act of June 25, 1948.....	141
III. Exceptions to statutes of limitations must be strictly construed against the Government and liberally construed in favor of the accused.....	141
IV. Conclusion	143

Point II.

Appellant Bridges was denied due process of law by the succession of proceedings against him concerned with the same issue of fact (Specification of Errors 7, 8, 9, 11, 12, 13, 14, 19, 20)	145
I. Appellant Bridges has been subjected to double jeopardy	150

- II. Appellant Bridges has been denied due process by reason of the repeated proceedings against him..... 159
- III. Appellant Bridges was improperly deprived of the advantage of the doctrine of *res judicata*..... 162

Point III.

The first and second counts of the indictment fail to state facts sufficient to constitute an offense against the United States (Specification of Errors 4, 5, 6, 19, 20)..... 175

Point IV.

The evidence is insufficient to sustain the conviction of appellants, or any of them, for the offense charged in the first count of the indictment (Specification of Error 20).. 181

Point V.

The third count of the indictment fails to state facts sufficient to constitute an offense against the United States (Specification of Errors 4, 5, 19, 20)..... 210

Point VI.

The evidence is insufficient to sustain the conviction of appellants Schmidt or Robertson, or either of them, of the offense charged in the third count of the indictment (Specification of Errors 4, 5, 19, 20)..... 219

Point VII.

The trial judge committed prejudicial error in questioning the defense witness Father Paul Meinecke and in making statements in the presence of the jury concerning his purpose in asking certain of the questions which he asked Father Meinecke (Specification of Errors 15, 16, 17)..... 222

Point VIII.

The trial court erred in refusing to admit in evidence the decision of the Supreme Court of the United States in *Bridges v. Wixon*, 326 U.S. 135, in relation to and in explanation of the testimony of appellants Schmidt and Robertson to the effect that they had read said decision and

in part on the basis thereof had come to the conclusion that appellant Bridges was not and never had been a member of the Communist Party in the United States (Specification of Errors 10, 19, 20)	227
---	-----

Point IX.

The trial judge committed prejudicial error in reading in the presence of the jury the statement of his reasons for refusing to permit counsel for the defense to cross-examine Government witness Kessler concerning his activities in connection with the preparation of the case against the defendants (Specification of Error 18)	229
--	-----

Point X.

The trial court committed prejudicial error in the giving of instructions to the jury and in the refusal to give instructions requested by the defendants (Specification of Errors 13, 14)	241
Preliminary statement	241
I. Instructions on reasonable doubt	242
II. Instructions on credibility of witnesses.....	245
III. Instructions re discrepancies and conflicts.....	249
IV. Instructions re conspiracy.....	253
V. The trial court erred in giving of its own volition the following instruction set out in Specification of Error 13(a), supra, p. 19	255
VI. The trial court committed prejudicial error in giving the instruction set forth under Specification of Error 13(c), supra, pp. 20-21 (Tr. 7868).....	258
VII. The trial court erred in giving instructions set forth in Specification of Error 13(i) and (m), supra. pp. 24 and 26-27 (Tr. 7880-1 and 7914).....	259
VIII. The trial court committed prejudicial error in giving the instruction set forth under Specification of Error 13(k), supra, pp. 25-26 (Tr. 7887).....	259

	Page
IX. The trial court erred in giving the instruction set forth in Specification of Error 13(1), supra, p. 26 (Tr. 7895)	260
Point XI.	
The trial court erred in its order revoking appellant Bridges' naturalization (Specification of Error 21).....	260
I. Preliminary	260
II. 8 U.S.C.A. 738(e) has no application to this case....	268
1. There had been no "conviction" at the time the order of revocation was entered	269
2. There was no conviction under the chapter referred to in 8 U.S.C.A. 738(e)	275
3. Bridges was not convicted of "knowingly" procuring naturalization in violation of law.....	276
Conclusion	281

Table of Authorities Cited

Cases	Pages
Ackerman v. I.L.W.U., 187 F.2d 860 (9 Cir., 1951).....	50
Adamson v. California, 332 U.S. 46 (1947).....	56, 159, 160
Adler v. United States, 182 Fed. 464 (5 Cir., 1910).....	226, 239
Anderson v. United States, 157 F.2d 429 (9 Cir., 1946)...	241
Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).....	75
Arbuckle v. State, 132 Tex. Crim. Rep. 371 (1937).....	272
Arizona Grocery Co. v. A. T. & S. F. Ry., 284 U.S. 370 (1932)	172
Arizona Wholesale Grocery v. S. P. Co., 68 F.2d 601 (9 Cir., 1934)	172
Bacon v. United States, 127 F.2d 985 (8 Cir., 1942).....	209
Bailey v. United States, 13 F.2d 325 (9 Cir., 1926).....	88
Baumgartner v. United States, 322 U.S. 665 (1944).....	263, 276
Bertsch v. Snook, 36 F.2d 155 (5 Cir., 1929).....	147
Braatelen v. United States, 147 F.2d 888 (8 Cir., 1945)..	93
Braverman v. United States, 317 U.S. 49 (1942).....	73
Bridges v. United States, 184 F.2d 881 (9 Cir., 1950)....	8, 51
Bridges v. Wixon, 144 F.2d 927 (9 Cir., 1944).....	
.....49, 62, 146, 147, 162, 195, 204, 258	
Bridges v. Wixon, 326 U.S. 135 (1945).....	
.....2, 15, 17, 19, 51, 58, 59, 60, 61, 153, 154, 155, 156, 227	
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)....	128
Brown v. Duchesne, 19 How. 183 (1857).....	128
Browne v. Zurbrick, 45 F.2d 931 (6 Cir., 1930).....	152
Buchanan v. United States, 233 Fed. 257 (8 Cir., 1916)....	227
Buhler v. United States, 33 F.2d 382 (9 Cir., 1929).....	192
Burlen v. Shannon, 99 Mass. 200 (1868).....	148
Burton v. United States, 202 U.S. 344 (1906).....	147
Butterworth v. United States, 112 U.S. 50 (1884).....	172
Caldwell v. United States, 139 F.2d 121 (5 Cir., 1943)....	209
Cannella v. United States, 157 F.2d 470 (9 Cir., 1946)....	93
Cardinal Bus Lines v. Consolidated Coach Corp., 254 Ky. 586 (1934)	172
Carter v. McClaghry, 183 U.S. 365 (1902).....	147
Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945)	136

	Pages
Choy Yuen Chan v. United States, 30 F.2d 516 (9 Cir., 1929)	54, 166
City of New Orleans v. Citizens Bank, 167 U.S. 371 (1897)	150
Coffey v. United States, 116 U.S. 436 (1886)	166, 167, 168
Collins v. Loisel, 262 U.S. 426 (1923)	161
Commonwealth v. Kiley, 150 Mass. 325 (1889)	270
Commonwealth v. McDermott, 224 Pa. 363 (1909)	270
Constanzo v. Tillinghast, 287 U.S. 341 (1932)	128
Continental Casualty Co. v. United States, 314 U.S. 527 (1942)	130
Copeland v. United States, 90 F.2d 78 (5 Cir., 1937)	209
Curley v. United States, 130 Fed. 1 (1 Cir., 1904), cert. den. 195 U.S. 628 (1904)	80
Dahly v. United States, 50 F.2d 37 (8 Cir., 1931)	209
Dennis v. United States, U.S., 71 S. Ct. 857, L. ed. (1951)	180
Dial v. Commonwealth, 142 Ky. 32 (1911)	270
Douglas v. Jeannette, 319 U.S. 157 (1943)	63
Ebeling v. Morgan, 237 U.S. 625 (1915)	147
Eldridge v. United States, 62 F.2d 449 (10 Cir., 1932)	192
Evans v. United States, 11 F.2d 37 (4 Cir., 1926)	90
Ex parte Bridges, 49 F. Supp. 292 (D.C. Cal., 1943)	146
Ex parte Collett, 337 U.S. 55 (1949)	127, 130
Ex parte Gagliardi, 284 Fed. 190 (D.C. Wash., 1922)	146, 149
Ex parte Lange, 18 Wall. 163 (1874)	161
Falter v. United States, 23 F.2d 420 (2 Cir., 1928), cert. den. 277 U.S. 590 (1928)	89, 90
Farm Investment Co. v. Carpenter, 9 Wyo. 110 (1900)	172
Frank v. Mangum, 237 U.S. 309 (1915)	164
Franklin v. North Weymouth Coop. Bank, 283 Mass. 275 (1933)	146
Frantz v. United States, 62 F.2d 737 (6 Cir., 1933)	226, 239
Fulbright v. United States, 91 F.2d 210 (8 Cir., 1937)	209
Gable v. United States, 84 F.2d 929 (7 Cir., 1936)	209
Gelston v. Hoyte, 3 Wheat. 246 (1817)	166
George H. Lee Co. v. Federal Trade Commission, 113 F.2d 583 (8 Cir., 1940)	54

TABLE OF AUTHORITIES CITED

ix

	Pages
Giles v. United States, 84 F.2d 943 (5 Cir., 1936).....	143
Glasser v. United States, 315 U.S. 60 (1942).....	226
Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942)	128
Griggs v. United States, 158 Fed. 572 (9 Cir., 1908).....	243
Haas v. Henkel, 216 U.S. 462 (1910)	80, 93, 117
Haller v. Commissioner, 26 B.T.A. 395	172
Hammerschmidt v. United States, 265 U.S. 182 (1924)....	80
Harrison v. Northern Trust Company, 317 U.S. 476 (1943)	86
Harrison v. United States, 200 Fed. 662 (6 Cir., 1912)....	227
Heald v. United States, 175 F.2d 878 (10 Cir., 1949), cert. den. 338 U.S. 859 (1949)	93
Heap v. City of Los Angeles, 6 Cal.2d 405 (1936).....	173
Helvering v. New York Trust Co., 292 U.S. 455 (1934)....	129
Holmberg v. Armbracht, 327 U.S. 392 (1946).....	136
Holmes v. United States, 134 F.2d (8 Cir., 1943), cert. den. 319 U.S. 776 (1943)	93
Holmgren v. United States, 156 Fed. 439 (9 Cir., 1907), aff. 217 U.S. 509 (1910)	94
Holt v. United States, 218 U.S. 245 (1910).....	245
Hunter v. United States, 62 F.2d 217 (5 Cir., 1932).....	226, 239
Huntington v. Attrill, 146 U.S. 657 (1892)	137, 151
Hyde v. United States, 15 F.2d 816 (4 Cir., 1926).....	227
In re Becker, 74 F.2d 306 (C.C. P.A., 1935).....	172
In re Harry Renton Bridges, before the Board of Immigra- tion Appeals, Jan. 3, 1942, p. 52	149
In re International Harvester Company, 16 L.A. 616 (Mc- Coy, 1951)	161
In re Nielsen, 131 U.S. 176 (1889)	147
In re Phillips, 17 Cal.2d 55 (1941)	274
I.L.W.U. v. Ackerman, 82 F. Supp. 65 (D.C. Hawaii, 1949)	50
Jones v. United States, 175 F.2d 544 (9 Cir., 1949).....	241
Joyner v. State, 158 Fla. 806 (1947).....	272, 273
Kansas City v. Southern Surety Co., 51 S.W.2d 221 (Mo. App., 1932)	150
Kassin v. United States, 87 F.2d 183 (5 Cir., 1937).....	206, 208

	Pages
Kavanagh v. Noble, 332 U.S. 535 (1947).....	136
Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922)	54
Kessler v. Strecker, 307 U.S. 22 (1939).....	57
Klapprott v. United States, 335 U.S. 601 (1949).....	156, 265, 266, 267, 276
Knauer v. United States, 328 U.S. 654 (1946)	263, 276
Langer v. United States, 76 F.2d 817 (8 Cir., 1935).....	209
Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683 (1895)	149
Laurent v. United States, 149 F.2d 598 (9 Cir., 1945)....	209
Lavin v. Pierotti, 129 F.2d 883 (C.C. P.A., 1942).....	172
Leung Jun v. United States, 171 Fed. 413 (2 Cir., 1909)...	172
Lisansky v. United States, 31 F.2d 846 (4 Cir., 1929), cert. den. 279 U.S. 873 (1929)	93
Louisiana v. Resweber, 329 U.S. 459 (1947).....	160, 161
Lovely v. United States, 175 F.2d 312 (C.C.A. 4, 1949), cert. den. 338 U.S. 834 (1949).....	137
Luse v. United States, 49 F.2d 241 (9 Cir., 1931)...176, 177, 260	
MacInnis v. United States of America, No. 12,599.....	222, 223, 224, 225, 226
Mariano v. Judge of District Court, 243 Mass. 90 (1922)..	274
Marzani v. United States, 168 F.2d 133 (App. D.C., 1948), aff. 335 U.S. 895 (1948).....	70, 91, 92, 99, 100, 101, 102, 109, 112, 115, 119, 144
Mathews v. United States, 19 F.2d 7 (3 Cir., 1927).....	146
Miller v. United States, 24 F.2d 353 (2 Cir., 1928), cert. den. 276 U.S. 638 (1928).....	90, 91
Miller v. United States, 120 F.2d 968 (10 Cir., 1941).....	227
Morgan v. United States, 159 F.2d 85 (10 Cir., 1947).....	211
Morton v. U.S., 60 F.2d 696	236, 237, 238
Murphy v. United States, 285 Fed. 801 (7 Cir., 1923), cert. den. 261 U.S. 617 (1923)	146, 158
Newman v. United States, 58 F.2d 751 (9 Cir., 1932).....	178
New Orleans v. Citizens Bank, 167 U.S. 371 (1897).....	166
Ng Fung Ho v. White, 259 U.S. 276 (1922).....	152

TABLE OF AUTHORITIES CITED

xi

	Pages
Olive etc. Committee v. Agricultural etc. Commission, 17 Cal.2d 204 (1941)	173
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944)	136
Osaka Shosen Kaishi Line v. United States, 300 U.S. 98 (1937)	130
Outlaw v. United States, 81 F.2d 805 (5 Cir., 1936), cert. den. 298 U.S. 665 (1936)	93
Owens v. United States, 130 Fed. 279 (9 Cir., 1904)	243
Ozawa v. United States, 260 U.S. 178 (1922)	129, 136
Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947)	130
Palko v. Connecticut, 302 U.S. 319 (1937)	159
Peightel v. United States, 49 F.2d 235 (8 Cir., 1931)	208
People v. Fabian, 192 N.Y. 443 (1908)	270
People v. Prather, 343 Ill. 443 (1931)	150
People v. Schaller, 224 App. Div. 3 (1928)	270
Pieteh v. United States, 110 F.2d 817	243, 244
Potter v. United States, 155 U.S. 438 (1894)	227
Quercia v. United States, 289 U.S. 466 (1933)	226, 239
Ribaste v. United States, 44 F.2d 21 (8 Cir., 1930)	208, 209
Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386 (1869)	136
Roberto v. United States, 60 F.2d 774 (7 Cir., 1932)	94
Roney v. Westlake, 216 Pa. 374 (1907)	150
Rothschild v. Marshall, 44 F.2d 546 (9 Cir., 1930)	172
Ryan v. Carter, 93 U.S. 78 (1878)	142
Schneiderman v. United States, 320 U.S. 118 (1943)	6, 179, 199, 213, 221, 262, 263, 264, 265, 276
Sealfon v. United States, 332 U.S. 575 (1948)	168
Shapiro v. United States, 335 U.S. 1 (1948)	75
Short v. United States, 91 F.2d 614 (4 Cir., 1937)	146, 161
Synder v. Massachusetts, 291 U.S. 97 (1934)	159
Southern Pacific Co. v. United States, 168 U.S. 1 (1897)	163, 164
Spratt v. Spratt, 4 Pet. 393 (1830)	169
Stainbaek v. Mo Hoek Ke Lok Po, 336 U.S. 368 (1949)	13
Staniforth v. State, 24 Ohio App. 208 (1927)	271, 272

	Pages
State v. Sacage, 86 W. Va. 655 (1920).....	270
Thompson v. United States, 30 App. D.C. 352 (1908).....	270
Tingle v. United States, 38 F.2d 573 (8 Cir., 1930).....	209
Tricito v. United States, 4 F.2d 664 (5 Cir., 1925).....	147
Trigg v. Industrial Commission, 364 Ill. 581 (1936).....	173
United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923)	173
United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937)	54, 172
United States ex rel. Harshman v. Knox County, 122 U.S. 306 (1887)	148
United States v. American Trucking Association, 310 U.S. 534 (1940)	85, 128
United States v. Ausmeyer, 152 F.2d 349 (2 Cir., 1945)....	241
United States v. Bader, 12 F. Supp. 922 (E.D. N.Y., 1935)	87
United States v. Bridges, 86 F. Supp. 922 (N.D. Cal., 1949)	6, 15, 67, 68, 70, 94, 95, 96, 162
United States v. Bridges, 87 F. Supp. (N.D. Cal., 1949)....	14, 15, 162
United States v. Bridges, 90 F. Supp. 973 (N.D. Cal., 1950)	8
United States v. Cameron, 282 Fed. 684 (D.C. Ariz., 1922)	178
United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926)	143
United States v. Chouteau, 102 U.S. 246 (1881).....	151, 161
United States v. Chouteau, 102 U.S. 603 (1881).....	137
United States v. Cobb, 163 Fed. 791 (D.C. Md., 1906).....	137
United States v. Cohn, 270 U.S. 339 (1926).....	80, 81, 82
United States v. De Angelo, 138 F.2d 466 (3 Cir., 1943)....	168
United States v. Dickson, 15 Pet. 141 (1841).....	142
United States v. Dotterwisch, 320 U.S. 277 (1943).....	128
United States v. Fotie, 137 F.2d 831 (8 Cir., 1943).....	94
United States v. Gates, 25 F. Cas. No. 15,191 (S.D. N.Y., 1845)	151
United States v. Gilliland, 312 U.S. 86 (1941) ..	96, 97, 98, 99, 102
United States v. Gottfried, 165 F.2d 360 (2 Cir., 1948), cert. den. 333 U.S. 860 (1948).....	91, 99, 104, 111, 112, 114, 115, 116, 118, 119, 120
United States v. Hamilton, 157 Fed. 569 (C.C. N.Y., 1907) ..	172

TABLE OF AUTHORITIES CITED

xiii

	Pages
United States v. Harding, 81 F.2d 563 (App. D.C., 1936) . . .	93
United States v. Keitel, 211 U.S. 370 (1908)	80, 93
United States v. Lafranca, 282 U.S. 568 (1931)	151
United States v. Lew Ah Jung, 224 Fed. 649 (D. Mass., 1915)	172
United States v. Marino, 91 F.2d 691 (9 Cir., 1937)	192
United States v. Obermeier, 186 F.2d 243 (2 Cir., 1950), cert. den. U.S., 71 S. Ct. 573, 95 L. ed. 452 (1951) 68, 70, 71, 91, 92, 99, 109, 110, 111, 112, 115, 119, 120, 122, 131, 137, 138, 139, 140, 143, 144, 164	
United States v. One Airplane, 23 F.2d 500 (S.D. Cal., 1927)	143
United States v. Oppenheimer, 242 U.S. 85 (1916)	164
United States v. Pandit, 15 F.2d 285 (9 Cir., 1926), cert. den. 273 U.S. 759 (1927)	169, 172, 173
United States v. Penn., 131 F.2d 1021 (2 Cir., 1942)	185, 209
United States v. Perplies, 165 F.2d 874 (7 Cir., 1948)	241
United States v. Rhodes, 212 Fed. 518 (D.C. Ala., 1913) . . .	176
United States v. Russo, 123 F.2d 420 (3 Cir., 1941)	209
United States v. Ryan, 284 U.S. 167 (1931)	75
United States v. Scharton, 285 U.S. 518 (1932) 69, 73, 77, 78, 79, 91, 99, 107, 108, 117, 119	
United States v. Stone, 135 Fed. 392 (D.N.J. 1905)	93
United States v. Ulrici, 28 Fed. Cas. No. 16,594, p. 329 (D.C. Mo., 1875)	137
United States v. Willard Tablet Co., 141 F.2d 141 (7 Cir., 1944)	54
United States v. Williams, U.S., 71 S. Ct. 595, 95 L. ed. 502 (1951)	168
United States v. Woods, 66 F.2d 262 (2 Cir., 1933)	243
United States v. McElvain, 272 U.S. 633 (1926) 69, 73, 77, 91, 99, 107, 117, 119, 142	
United States v. McKee, 26 Fed. Cas. No. 15,688 (E.D. Mo., 1877)	151
United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 145, 148, 166	
United States v. National City Lines, 337 U.S. 78 (1949) 127, 133	
United States v. Noveck, 271 U.S. 201 (1926) 69, 73, 76, 77, 91, 99, 107, 117, 119, 142	

	Pages
Wade v. Hunter, 336 U.S. 684 (1949).....	157
Wallis v. Tecchio, 65 F.2d 250 (5 Cir., 1933).....	152
Weinhandler v. United States, 20 F.2d 359 (2 Cir., 1927), cert. den. 275 U.S. 554 (1927).....	88, 89
Wiborg v. United States, 163 U.S. 632 (1896).....	241
Williams v. United States, 93 F.2d 685 (9 Cir., 1937)....	226, 239
Wong Chow Gin v. Cahill, 79 F.2d 854 (9 Cir., 1935).....	149
Wong Kam Chang v. United States, 111 F.2d 707 (9 Cir., 1940)	149
Wong Sun v. United States, 293 Fed. 273 (6 Cir., 1923)....	146

Constitutions

United States Constitution, Fifth Amendment.....	
.....	5, 6, 9, 14, 17, 151, 157

Statutes

Act of June 25, 1948, c. 645, 80th Cong., Section 21 (United States Code, Congressional Service, 80th Cong., 2d Sess., page 2423 ...	13, 16, 70, 131, 133, 134, 137, 138, 141, 142, 143, 276
Contract Settlement Act of July 1, 1944 (c. 358, Section 1, et seq., 58 Stat. 649, 41 U.S.C.A. Section 101 et seq.)	74
Criminal Code of 1909, Sections 533 and 534 (34 Stat. 1159)	139
Naturalization Act of March 3, 1903 (57th Cong., 2d Sess., Chapter 1012, 32 Stat. 1213, 32 Stat. 1222)	279
Revenue Act of 1926 (Feb. 26, 1926, c. 27, Section 1110(a), 44 Stat. 114)	73
R.S. Section 13	139
R.S. Section 5598	139
R.S. Section 5599	139
34 Stat. 603	140
40 Stat. 1015, c. 194	117
56 Stat. 747, c. 555, Section 1	74
62 Stat. 83	11

TABLE OF AUTHORITIES CITED

xv

	Pages
62 Stat. 862, c. 645, Section 21	10
Surplus Property Act of October 3, 1944 (c. 479, Section 1 et seq., 58 Stat. 781, 41 U.S.C.A. 201)	74
United States Code, Congressional Service, 80th Cong., 2d Sess.:	
page 2687	125
page 2688	125
page 2691	126
pages 2697-2698	126
page 2721	127
page 2434 et seq.	127
1 U.S.C.A. 109	68
1 U.S.C.A. 110	139
8 U.S.C.A. Chapter 11	275
8 U.S.C.A. 137	185
8 U.S.C.A. 705	179, 185, 213, 214, 221
8 U.S.C. 732(a) (16)	179
8 U.S.C.A. 734-736	220
8 U.S.C.A. 738, subsections (a) to (d)	261, 268
8 U.S.C.A. 738(e)	
.....7, 12, 46, 260, 261, 268, 269, 273, 275, 276, 277, 278, 281	
8 U.S.C.A. 746	212, 214, 218, 276
8 U.S.C.A. 746, subsection (a)	280
8 U.S.C.A. 746, subdivision (a)(1)	94, 214, 215, 218, 275
8 U.S.C.A. 746, subdivisions (a)(4)c and (a)(4)d	
.....212, 214, 218	
8 U.S.C. 746(a)(5)	10, 94, 101, 211, 212, 215, 216, 217
8 U.S.C.A. 746(g)	11, 60, 68, 71, 122, 131
8 U.S.C.A. 746(h)	140
18 U.S.C. (1946 ed.) 11	180
18 U.S.C. Section 21	121, 122, 123, 133, 135

	Pages
18 U.S.C.A. Chapter 47	278
18 U.S.C.A. (old) 80	81, 111
18 U.S.C.A. (old) 88	109, 111
18 U.S.C. 287 and 1001	84
18 U.S.C.A. (old) 582	68
18 U.S.C. 371	4, 9, 92, 101, 108
18 U.S.C.A. 746(1)	275
18 U.S.C. 1015	101
18 U.S.C. 1015(a)	4, 278
18 U.S.C. 1015(1)	10, 275
18 U.S.C.A. 1425	278
18 U.S.C. 3231	9
18 U.S.C.A. 3282	
..... 11, 67, 68, 71, 88, 123, 128, 130, 131, 132, 135, 138, 141	
18 U.S.C.A. 3287	
..... 12, 13, 16, 67, 68, 73, 74, 75, 79, 80, 84, 85, 86, 87, 97	
18 U.S.C.A. 3731	98
28 U.S.C. 1291	9
41 U.S.C.A. 107, 115(a), (b), 116(a), (b), 118(d), (e), 119	83
41 U.S.C.A. 119	83
41 U.S.C.A. 101(a) to (f)	83
41 U.S.C.A. 239	84
50 U.S.C.A. App. 1611	84

Other Authorities

6 A.L.R. 407	169
113 A.L.R. 1181	274
Black's Law Dictionary, 1933 ed.	131

TABLE OF AUTHORITIES CITED

xvii

	Pages
13 C. J. 909	269
16 C. J. 1267	269
Cooley, Constitutional Limitations, 7th Ed., Ch. 10 and 11..	158
86 Cong. Rec. 9031	57
88 Cong. Rec. 4759	87
88 Cong. Rec. 6160	87
Federal Rules of Criminal Procedure:	
Rule 30	241
Rule 52(b)	241
2 Freeman on Judgments (5th ed.), Section 624 et seq...	150
Funk & Wagnall's New Standard Dictionary, 1920 ed.....	131
H.R. No. 304, 80 Cong., 1st Sess.....	127
H.R. 1600, March 9, 1947	125
H.R. 2055, March 9, 1947	125
H.R. 5450, December 6, 1944 (U.S.C., Congressional Service, 80th Cong., 2d Sess., page 2669)	134
H.R. 9766, 76th Cong., 3d Sess.	57
Norberg, The Wartime Suspension of Limitation Act, 3 Stan- ford Law Rev. 440, 445, 446, 451-452	87, 92, 112, 182
Rules of Criminal Procedure for the United States District Courts, Rule 47	5, 6
S. Rep. 2031, 76th Cong., 3d Sess., page 9.....	57
I Wharton's Criminal Evidence (10th ed. 271-272).....	178
I Wharton's Criminal Evidence (11th ed.) 588-589.....	178

Nos. 12,597 and 12,607

United States Court of Appeals For the Ninth Circuit

HARRY RENTON BRIDGES, et al.,	}
<i>Appellants,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

Upon Appeals from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

INTRODUCTORY STATEMENT.

These are appeals (Tr. 241-244)¹ from judgments of the United States District Court for the Northern District of California (Southern Division) convicting appellants of violating sections of Title 8 and Title 18 of the United States Code, and committing appellants to custody therefor (Tr. 235-240) and from a judgment of the same Court revoking the citizenship of appellant Bridges.

Each appellant is, or has been, an officer of the International Longshoremen's and Warehousemen's Union and each has been active in its affairs. This prosecution arose out of alleged violations of the

¹All references are to the Transcript of Record in Case No. 12597, unless otherwise indicated.

United States Code committed in connection with the naturalization in 1945 of appellant Bridges.

Harry R. Bridges has resided continuously in the United States since 1920, when he entered legally as an immigrant seaman from Australia. (Tr. 43.) He was naturalized on September 17, 1945. (U.S. Ex. 4.) His wife is a native-born American citizen, as are his children. His naturalization was procured after a long series of investigations and proceedings during which the Government and others sought to secure his deportation upon the ground that he was or had been a member of, or that he was or had been affiliated with, the Communist Party of the United States. After a judicial decision adverse to the Government (*Bridges v. Wixon*, 326 U.S. 135 [1945]), Bridges was finally permitted to complete his pending naturalization proceeding.

On June 23, 1945 (five days after the decision of the Supreme Court of the United States in *Bridges v. Wixon*, *supra*), Bridges filed at the San Francisco office of the Immigration and Naturalization Service his application for a certificate of arrival and his preliminary form for a petition for naturalization. (U.S. Ex. 1.) Pursuant to notice thereafter received from the Service, he appeared, on August 8, 1945, before a naturalization examiner, in connection with his naturalization petition. At the same time appellants Schmidt and Robertson also appeared and witnessed the naturalization petition.²

²Appellant Robertson was called in at the last minute to take the place of a prospective witness whose citizenship qualifications were not established to the satisfaction of the examiner. (Tr. 459-461.)

On September 17, 1945, Bridges, with the same two witnesses, appeared in the Superior Court of the State of California, in and for the City and County of San Francisco, Honorable Thomas M. Foley presiding, and testimony was given in support of the petition. The two witnesses gave testimony to the effect that they were American citizens, that they knew appellant for at least five years, and knew him to be a person of good moral character, that they would vouch for his loyalty to the United States, and that they would recommend him to citizenship. (U.S. Ex. 3.)³ Government counsel stated that the witnesses were satisfactory, and they were excused.

Bridges was next examined. The following was one of the many questions put to and answers given by him:

“Q. Do you now or have you ever belonged to the Communist Party in the United States?

A. I have not, I do not.” (U.S. Ex. 3.)

After further examination, Government counsel stated that the Government had no further evidence and that the Government had no objection to the naturalization of appellant. (Tr. 549.) Bridges was thereupon naturalized by the Court.

Thereafter, on May 25, 1949, *three years, eight months, and eight days* after the naturalization, an indictment (Tr. 3-8) against Bridges and his two

³It is not alleged in the indictment herein, nor did the Government offer any proof at the trial, that any of these statements were false.

witnesses was filed in the Court below, charging substantially as follows:

(Count 1) That appellants violated 18 U.S.C. 371 (formerly 18 U.S.C. 88) by conspiring to defraud the United States by impairing, obstructing, and defeating the proper administration of its naturalization laws, by having Bridges fraudulently petition for and obtain the aforesaid naturalization. The fraud allegedly consisted of the fact that Bridges' statement that he did not belong to and had never belonged to the Communist Party in the United States was false since he allegedly did belong to the Communist Party and had been a member thereof from 1933 to September 17, 1945.

The following overt acts were alleged to have been committed in pursuance of the alleged conspiracy: (a) the filing on June 23, 1945, by Bridges, of his application for a certificate of arrival and his preliminary form for petition for naturalization; (b) the appearance on August 8, 1945, by Bridges, before the naturalization examiner; (c) the appearance on August 8, 1945, by Schmidt and Robertson, before the naturalization examiner and their witnessing of the naturalization petition; and (d) the appearance on September 17, 1945, by appellants, before Judge Foley and the giving of testimony in support of the petition for naturalization.

(Count 2) That Bridges violated 18 U.S.C. §1015(a)⁴ (formerly 8 U.S.C. 746[a][1]⁵) in that on

⁴Mis-cited in the indictment as 18 U.S.C. 1015(1).

⁵Mis-cited in the indictment as 8 U.S.C. §746(1).

September 17, 1945, in the naturalization proceeding before Judge Foley, he made a false statement under oath by answering as aforesaid. It was alleged that the question put to appellant was material and the falsehood was willful.

(Count 3) That Schmidt and Robertson violated the old 8 U.S.C. §746(a)(5)⁶ in that they encouraged, aided, advised, and assisted Bridges to obtain, receive and accept a fraudulently obtained certificate of naturalization.

After the indictment was returned by the Grand Jury, Bridges moved its dismissal (Tr. 10-26) on the grounds, *inter alia*, that the prosecution was outlawed by the statute of limitations; that the indictment did not state facts sufficient to constitute an offense against the United States; that there was a fatally defective lack of particularity with respect to certain allegations; that the prosecution in the face of the prior adjudications⁷ constituted placing him twice in jeopardy contrary to the provisions of the Fifth Amendment to the Constitution of the United States; that the said prior adjudications were *res judicata* of the issues raised by the indictment; that the prosecution, in the face of the prior adjudications, was a deprivation of his life, liberty or property without due proc-

⁶Mis-cited in the indictment as 8 U.S.C. §746(5).

⁷The facts with respect to these adjudications were called to the trial Court's attention by affidavits (Tr. 42-70) filed in support of the motions pursuant to the provisions of Rule 47, *Rules of Criminal Procedure for the United States District Courts*. The facts set forth in these affidavits were not denied by the Government.

ess of law, contrary to the provisions of the Fifth Amendment; that this proceeding, by singling him out for prosecution, in view of the facts shown by the affidavits filed, was a deprivation of his life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment; that the prosecution, having been instituted not in good faith for the purpose of enforcing the penal or any other laws of the United States, but for other and different purposes and motives,⁸ was a deprivation of his life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment; that the prosecution, being an attempt to punish him for the expression of his views on political, social and economic matters and for his associations, was an infringement of the rights guaranteed to him under the First Amendment to the Constitution; that in view of the decision in *Schneiderman v. United States*, 320 U.S. 118 (1943), and other cases, the question, the answer to which was the basis of the prosecution, was immaterial in the naturalization proceeding.

Appellants Schmidt and Robertson filed substantially similar motions to dismiss on those of the foregoing grounds which were applicable to them. (Tr. 27-41, 8312.)

The motions to dismiss were all denied (*United States v. Bridges*, 86 F.Supp. 922 [N.D.Calif., 1949].).

⁸Affidavits in support of these contentions (Tr. 73-75, 146) were also submitted to the trial Court under Rule 47, *supra*, and the material allegations thereof likewise were not denied by the Government.

Thereafter, and commencing on November 14, 1949, the trial of appellants was commenced before a jury in the Court below. With only occasional interruptions the trial ran continuously from April 4, 1950, on which date the jury returned a verdict of guilty against Bridges on Counts 1 and 2 of the indictment, and a verdict of guilty against Schmidt and Robertson on Counts 1 and 3 of the indictment. That is, a verdict of guilty against all appellants was returned on all counts of the indictment. (Tr. 220-222.)

Motions in arrest of judgment and for new trials on behalf of each of the appellants were duly made. (Tr. 223-228.) All were denied (Tr. 229), and Bridges was, on April 10, 1950, sentenced to prison for two years on the first count of the indictment and five years on the second, said sentences to run concurrently. (Tr. 230, 235-236.) Schmidt and Robertson were each sentenced to two years imprisonment on Counts 1 and 3 of the indictment, said sentences to run concurrently. (Tr. 231-234, 237-240.) Notices of appeal to this Court were thereupon duly filed for each appellant. (Tr. 241-244.) At the time sentence was pronounced the trial Court, with the acquiescence of the Government, released appellants on bail pending their appeals. (Tr. 8041, *et seq.*; 8154, *et seq.*)

On June 16, 1950, upon motion made by the Government (Tr. 8162) and over the opposition of appellant Bridges (Tr. 8164) and purportedly acting upon the authority of 8 U.S.C.A. 738(e), the trial Court signed and filed a memorandum opinion and order declaring the citizenship of appellant Bridges revoked

and directing the Government to present an appropriate decree. (Tr. 3-7 of 12607.) (*United States v. Bridges*, 90 F.Supp. 973 [N.D.Calif., 1950].) On June 20, 1950, the trial Court signed and filed a "Decree Revoking, Setting Aside and Declaring Void the Final Order Admitting Defendant Harry Renton Bridges to Citizenship". (Tr. 8-12 of 12607.) Notices of appeal from the foregoing order and decree were immediately filed by appellant Bridges. (Tr. 7-8, 12-13 of 12607.)

The appeals taken from the order and decree revoking Bridges' citizenship were consolidated by stipulation with the appeal taken earlier from the order and judgment of imprisonment. (Tr. 16-17 of 12607.)

On July 31, 1951, the Government filed a motion with the trial Court for an order to revoke the order granting bail to appellant Bridges and to remand him to the custody of the Marshal. Over appellant's objection and despite the admission by the Government that the appeal here pending presented substantial questions for review, such an order was made by the trial Court on August 5, 1950, and Bridges was incarcerated in the San Francisco County Jail until released by the mandate of this Court on August 25, 1950. (*Bridges v. United States*, 184 F.2d 881 [9 Cir., 1950].)

During the course of the trial, error prejudicial to appellants was committed by the Court. This error consisted, *inter alia*, of the admission of evidence offered by the Government; the rejection of evidence offered by the appellant; misconduct of Government

counsel; misconduct of the trial Court; instructions given at the request of Government counsel or by the Court of its own motion; and the refusal to give instructions requested by appellant.

The trial itself, by virtue of the foregoing matters, was not a fair trial and the appellants were thereby deprived of the due process of law guaranteed to them by the Fifth Amendment.

The trial Court erred in revoking appellant's citizenship, for the reasons, *inter alia*, that it had no jurisdiction to make such an order because of the fact that the case already was on appeal before this Court by virtue of the filing of timely notices of appeal; that appellant's conviction was not final; that appellant was not convicted under any chapter of the Nationality Code; and that appellant was neither charged with nor convicted of knowingly procuring naturalization in violation of law.

JURISDICTION.

Jurisdiction of the District Court over the alleged offenses is conferred by 18 U.S.C. 3231. Jurisdiction of the Court of Appeals to hear and determine this appeal is conferred by 28 U.S.C. 1291.

STATUTES INVOLVED.

18 U.S.C. 371, upon which the first count of the indictment was based, reads, so far as is relevant to this proceeding as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * * or imprisoned.”

18 U.S.C. 1015(1), upon which the second count of the indictment was based reads, so far as is relevant to this proceeding, as follows:

“Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens * * * shall be fined * * * or imprisoned * * *”

8 U.S.C. §746(a) (5), upon which the third count of the indictment was apparently based, read, before its repeal,⁹ so far as is relevant to this proceeding, as follows:

“It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise * * *

“(5) To encourage, aid, advise, or assist any person not entitled thereto to obtain, accept, or receive any * * * certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or of citizenship—

a. Knowing the same to have been procured by fraud; or

⁹This statute was repealed June 25, 1948, effective September 1, 1948, by C. 645, §21, 62 Stat. 862.

- b. Knowing the same to have been procured by the use or means of any false name or false statement given or made with intent to procure the issuance of such * * * certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or citizenship * * *
-

The applicable statute of limitations is to be found in 18 U.S.C.A. 3282, and reads *in toto* as follows:

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.”

The statute of limitations which was found in the Nationality Code prior to its repeal on June 25, 1948,¹⁰ is found in 8 U.S.C.A. 746(g), and reads *in toto* as follows:

“No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this chapter unless the indictment is found or the information is filed within five years next after the commission of such crime.”

Section 21 of the Act of June 25, 1948,¹¹ repealing the foregoing section, reads *in toto* as follows:

“The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the

¹⁰See note 9, *supra*.

¹¹62 Stat. 83.

following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.”

The so-called Wartime Suspension statute, 18 U.S.C.A. 3287, relied on by the Government and cited by the trial Court, reads *in toto* as follows:

“When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

“Definitions of terms used in section 103 of Title 41 shall apply to similar terms used in this section.”

8 U.S.C.A. 738(e) upon which the revocation of Bridges’ citizenship was purportedly based, reads *in toto* as follows:

“When a person shall be convicted under this chapter of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.”

QUESTIONS PRESENTED.

1. Whether the prosecution of appellants was barred by the operation of the statute of limitations.
2. Whether the so-called Wartime Suspension statute—18 U.S.C.A. 3287—is applicable to this proceeding.
3. Whether the so-called “savings clause”—§ 21 of the Act of June 25, 1948—is applicable to this proceeding.
4. Whether the indictment and each count thereof stated facts sufficient to constitute an offense against the United States.
5. Whether the indictment and each count thereof stated such facts with sufficient particularity.
6. Whether the question propounded to Bridges in the naturalization proceeding, the answer to which is the basis for this action, was material to that proceeding.

7. Whether, in view of the prior adjudications, this proceeding placed Bridges in double jeopardy of his life and limb for the same offense, contrary to the provisions of the Fifth Amendment.

8. Whether, in view of the prior adjudications, this proceeding deprived Bridges of life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment.

9. Whether, in view of the prior adjudications, the doctrine of *res judicata* was applicable to this proceeding.

10. Whether the trial Court erred in denying appellants' motions to dismiss the indictment and each count thereof by virtue of the questions presented by the foregoing.

11. Whether in its rulings with respect to the inclusion of evidence proffered by the Government and the exclusion of evidence proffered by appellants, the trial Court committed error prejudicial to appellants.

12. Whether in its conduct of the trial, the trial Court committed error prejudicial to appellants.

13. Whether counsel for the Government, during the course of the trial, made statements and engaged in conduct prejudicial to appellants.

14. Whether the trial Court committed error prejudicial to appellants by rejecting appellants' plea of *res judicata* and permitting the introduction of evidence concerning matters already the subject of ad-

judication between appellant Bridges and the Government of the United States.¹²

15. Whether the trial Court committed error prejudicial to appellants by refusing to permit the submission to the jury of evidence concerning the prior deportation proceedings and the decision of the Supreme Court of the United States in *Bridges v. Wixon*, 326 U.S. 135 (1945).

16. Whether the trial Court committed error prejudicial to appellants in its instructions to the jury, particularly with respect to the doctrine of reasonable doubt, with respect to the alleged materiality of the question propounded to appellant Bridges in the naturalization proceeding, and with respect to the doctrine of *res judicata*.

17. Whether the trial Court had jurisdiction to make and enter any opinion, decree or order revoking the citizenship of appellant Bridges in view of the fact that notices of appeal from the judgment of imprisonment had already been filed.

18. Whether the trial Court erred in making its opinion, order and decree revoking Bridges' citizen-

¹²Originally, by appropriate motion to dismiss before trial, the defense of *res judicata* to the entire proceeding was raised. The motion to dismiss was denied. (*United States v. Bridges*, 86 F. Supp. 922 [N.D. Calif., 1949].) During the trial timely objections to the introduction of any evidence touching on alleged incidents within the periods embraced in the prior adjudications were made. These objections were overruled. (*United States v. Bridges*, 87 F. Supp. 14 [N.D. Calif., 1949].) Appellants also proposed instructions to the jury which would have directed it to disregard evidence touching on alleged incidents within the periods embraced in the prior adjudications. These instructions were not given by the trial Court. (Tr. 293-296.)

ship despite the fact that his conviction was not yet final because of the pendency of the appeal to this Court.

19. Whether the trial Court erred in making its opinion, order and decree revoking Bridges' citizenship despite the fact that he had not been convicted under any chapter of the Nationality Code as required by 8 U.S.C.A. 738(e).

20. Whether the trial Court erred in making its opinion, order and decree revoking Bridges' citizenship despite the fact that he had not been convicted of knowingly procuring naturalization in violation of law as required by 8 U.S.C.A. 738(e).

SPECIFICATION OF ERRORS.

1. The Court below erred in not holding that the prosecution was barred by the operation of the statute of limitations.

2. The Court below erred in holding that the so-called Wartime Suspension statute—18 U.S.C.A. 3287—was applicable to this proceeding.

3. The Court below erred in holding that the so-called "savings clause"—§ 21 of the Act of June 25, 1948—was applicable to this proceeding.

4. The Court below erred in holding that the indictment and each count thereof stated facts sufficient to constitute an offense against the United States.

5. The Court below erred in holding that the indictment and each count thereof stated such facts with sufficient particularity.

6. The Court below erred in holding that the question propounded to appellant Bridges in the naturalization proceeding, the answer to which is the basis for this prosecution, was material to that proceeding.

7. The Court below erred in holding that despite the prior adjudications this proceeding did not constitute placing appellant Bridges in double jeopardy of his life and limb for the same offense contrary to the provisions of the Fifth Amendment.

8. The Court below erred in holding that despite the prior adjudications this proceeding did not constitute a deprivation of appellant Bridges' life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment.

9. The Court below erred in holding that despite the prior adjudications, the doctrine of *res judicata* was not applicable to this proceeding.

10. The Court below erred in its ruling with respect to the exclusion of evidence proffered by appellants:

(a) The trial Court erred in rejecting appellants' offer of the decision of the Supreme Court of the United States in the case of *Bridges v. Wixon, supra*, during the course of the testimony of the witnesses Garner, Schmidt and Robertson.

The grounds urged at the trial for the admission of this evidence were:

(1) In the case of the witness Garner, to explain his prior testimony that he had read and was familiar with the decision, and further to demonstrate the extent of his knowledge at the time of his examination, particularly of the appellants Schmidt and Robertson, in the 1945 naturalization proceeding in order to test the credibility of his prior testimony that he had put certain questions to said appellants in those proceedings. (Tr. 526-527, 610.)

(2) In the case of the witnesses Robertson and Schmidt, to demonstrate the basis of their defense that they believed in good faith that appellant Bridges was entitled to citizenship and was not a member of the Communist Party. (Tr. 4226, 4248, *et seq.*, 4617-4619.)

(b) The trial Court erred in rejecting appellants' offer of the findings and conclusions of Dean James M. Landis during the course of the examination of the witness Garner.

The grounds urged at the trial for the admission of this evidence were to explain the witness Garner's prior testimony that he had read and was familiar with those findings, and to ascertain whether those findings had any bearing on his actions in the naturalization proceedings, and to test the credibility of his prior testimony that he had put certain questions to appellants Schmidt and Robertson during the 1945 naturalization proceedings. (Tr. 599-610.)

11. The Court below erred in rejecting appellant's plea of *res judicata* and permitting the introduction

of evidence concerning matters already the subject of adjudication between appellant and the Government.

12. The Court below erred by refusing to permit to be submitted to the jury evidence concerning the prior adjudications between appellant Bridges and the Government, and particularly the decision of the Supreme Court of the United States in *Bridges v. Wixon, supra*.

13. The trial Court erred in giving the following instructions:

(a) In the issue of Mr. Bridges' asserted membership in the Communist Party, eleven witnesses have testified for the government: Messrs. Schomaker, Schrimpf, Hancock, Mrs. Harris, Mr. Krolek, Johnson, Crouch, Ross, Michener, Wilson and Rathborne. As opposed to the foregoing witnesses concerning the alleged membership in the Communist Party, Mr. Bridges, as well as the other defendants, the defendants have offered two witnesses other than themselves, that is, Bruce B. Jones and Mrs. Jean Murray. These, apart from the character witnesses offered by the defense. (Tr. 7864-7865.)

At the trial it was urged that this instruction imposed an unreasonable burden on the appellants and was contrary to the law that the quality and not the quantity of the evidence is determinative of the issue.

(b) Allusions have been made by the defense to certain irrelevant and immaterial matters concerning the Immigration Department and its procedures and operations regarding matters, things

and events other than the investigation and the prosecution of the case at bar. Many of such matters were sought to be elicited by the defense in questions asked and propounded, to which objections were properly sustained by the Court or motions to strike granted with respect to the purported questions. In view of the Court's action with regard to the same, you must ignore the contents of such question or questions and the implication or implications contained therein. This rule applies generally and equally to all questions to which objections have been sustained or motions to strike granted. You are not permitted to conjecture or surmise what the answer or answers might have been if the Court had not sustained the objections or the motions to strike. In short, the matter of ruling on all such procedural matters rests solely with the Court. That is exclusively my province and you are bound by the Court's rulings on such matters. (Tr. 7867-7868.)

It was urged that this took away from the jury determinations arising from questions concerning the previous proceedings as they affected the credibility of witnesses produced by the government. (Tr. 7909.)

(c) During the course of the trial, there have been various and repeated references made to the opinion of the Supreme Court in the case of *Bridges v. Wixon*. I have repeatedly held and rendered written opinions herein that the decision of the Supreme Court is not determinative of any legal or factual issue in the case at bar, and accordingly, I advise and instruct you. You are not to draw any inference or inferences with respect to the objections which I have sustained

and the offer on the part of the defense to place the decision before you or to have its contents read to you. The admissibility of the opinion is a question of law for the Court. Members of the jury are bound by my determination. (Tr. 7868.)

This instruction was error because it ignored the doctrine of *res judicata*. (Tr. 7909-7910.)

(d) There are certain well-defined rules which apply as to how you shall weigh and consider testimony. Many of them are such as these: First, you have the right to observe the witness upon the stand and to consider the impression he or she may make upon you with respect to telling the truth or telling a falsehood. You have a right to observe his or her demeanor, his attitude, whether he appears conscientiously to be stating to the best of his ability the truth, or whether he appears to be suppressing something or coloring his testimony in a manner not to reveal the truth. If the witness has the appearance of attempting to the best of his ability to tell the truth, and other circumstances tend to establish that situation, then you give full credit to his testimony. But if you are impressed that the witness is attempting to hide something or is not telling the whole truth, then you have the right to give only such consideration to his testimony as you may think it entitled to receive. (Tr. 7869.)

This instruction was error because it disregarded ordinary rules for determining credibility. (Tr. 7911-7912.)

(e) If you should find that there are discrepancies or inconsistencies existing in the testimony

of any witness or between the testimony of any witnesses, or if you should find yourself disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies or such points of difference affect the true issue in this case. Examine such discrepancies or inconsistencies and such disputed points and ask yourselves these questions: How does the decision of this or that or the other discrepancy or other matter in dispute affect the guilt or innocence of the defendants? Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question: Did or did not the defendants commit that charges or acts as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendants? If they are not material, if the decision of the same is not necessary to enable you to arrive at the guilt or innocence of the defendants, then such discrepancy or disputed points are immaterial and minor matters, and you should waste no further time in discussing or considering them. (Tr. 7872-7873.)

This instruction was error on the ground that it disregarded ordinary rules for determining credibility. (Tr. 7911-7912.)

(f) You should look to the interest which the respective witnesses have in the trial or in its results. Where the witness or witnesses has or have a direct personal interest in the result of the trial, the temptation is strong to color, pervert or withhold the facts. The law permits the defendant at

his own request to testify in his own behalf. The defendants have availed themselves of this privilege. Their testimony is before you and you must determine how far it is credible. The deep personal interest which they have in the result of the trial should be considered by the jury in weighing their evidence in determining how far or to what extent it is worthy of credit. The fact that one is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. (Tr. 7874.)

This instruction was error because it subjected the testimony of the appellants to an unfairly critical examination in the light of the entire record. (Tr. 7913.)

(g) Prior deportation proceedings against Mr. Harry Bridges, held before the Bureau of Immigration Examiners, are in no way in issue in this case, nor are any court decisions which have been frequently mentioned relevant issues in this trial. (Tr. 7877.)

This was objected to as depriving appellants of the benefits of the doctrine of *res judicata*. (Tr. 7909-7910.)

(h) The motive of the prosecution is not relevant to the ordinary criminal proceeding; the material questions ordinarily are whether the defendant has committed the act or acts alleged and whether the act or acts constitute a crime. In the instant case, the basic crime charged against the defendant, Mr. Bridges, is that of false swear-

ing. Though a defendant in a criminal case may show by proper evidence the hostility, bias or interest of any witness, the motive of the prosecution in instituting the present criminal action is immaterial unless you believe that such alleged motive constitutes evidence establishing the innocence or guilt of the accused, or the defendants on trial. (Tr. 7878.)

This was objected to as contrary to the evidence and the law. (Tr. 7916.)

(i) The third count or charge in substance alleges a concert of action as to the two defendants, Henry Schmidt and J. R. Robertson, in that they aided and abetted the defendant, Bridges, in obtaining citizenship fraudulently by reason of false testimony offered. The charge in substance is as follows: On September 17, 1945, the defendants, Henry Schmidt and J. R. Robertson, assisted Harry Renton Bridges to obtain a Certificate of Naturalization by fraudulent means in a naturalization proceeding before the Superior Court of the State of California at a time when the defendants knew that Harry Renton Bridges had been and was a member of the Communist Party in the United States from 1933 up to and including September 17, 1945. Such fraud consisted in giving false statements and making false representations before the Superior Court with respect to Harry Renton Bridges' membership or alleged membership in the Communist Party during the period in question. (Tr. 7880-7881.)

This instruction was error because it misstated the law. (Tr. 7911.)

(j) The term reasonable doubt means a doubt for which a good reason can be given, in the light of all the evidence. It means a doubt which is substantial and not merely shadowy. It does not mean a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance on the part of a juror to perform an unpleasant duty, or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all the evidence presented.

Without its being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

Remember that the defendant or defendants are entitled to any reasonable doubt, as defined, that you may have in your minds; but at the same time also remember that if you have no such doubt, the government is entitled to a verdict. (Tr. 7885-7886.)

This instruction misstated the law. (Tr. 7914.)

(k) As concerns the defense offered on behalf of the defendants Schmidt and Robertson, the crucial question is whether or not there was any intent upon the part of either of these defendants to deceive and defraud the Government of the United States.

The asserted good faith, the intent, the purpose and motive of what was done by the defendants Schmidt and Robertson constitute the vital and important element of the case brought against them. Hence the jury may consider any material

explanation of their motives and purposes in determining the character of their participation in the citizenship hearing of the defendant Harry Bridges. (Tr. 7887.)

This instruction misstated the law. (Tr. 7914.)

(1) On the question of materiality of the alleged false testimony, however, I further charge you that it is my duty, as the trial judge, to determine whether or not the alleged false testimony was material testimony in the naturalization proceeding before Judge Foley. I charge you, therefore, that if you find that Harry Bridges gave the answers as alleged in the indictment, then such answers were material answers in the naturalization proceeding.

To state it more briefly, whether or not the alleged false testimony was given in the circumstances alleged is a fact question for you to decide. Whether or not the alleged false testimony was material testimony is a law question for the Court to decide. I charge you that the alleged false testimony was material, and that if you find the false testimony was given as alleged, you are not to concern yourselves further with the question of materiality of the testimony. (Tr. 7895.)

This instruction misstated the law with respect to the materiality of the question. (Tr. 7915.)

(m) The defendants, Schmidt and Robertson, have been charged in the third count of the indictment with aiding and abetting the defendant, Bridges, to obtain his citizenship by fraudulent statements and representations pertaining to his alleged membership in the Communist Party. So

that you may understand the meaning of the charge in this count, I shall attempt to explain the legal scope and significance of the term, "to aid or abet."

For one person to abet another person in the commission of a criminal offense, it simply means knowingly and with criminal intent to aid, promote, encourage or instigate, by act or counsel, or both act and counsel, the commission of such criminal offense. (Tr. 7897.)

This instruction misstated the law. (Tr. 7914.)

(n) Expressed in another way, a conspiracy is an unlawful agreement entered into by two or more persons to commit a crime against the United States or to defraud the United States. To sustain a charge of conspiracy, it must be shown that one of the members of the conspiracy did some act commonly called an overt act, in furtherance of the object of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street or driving an automobile or using a telephone. But, if during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act. (Tr. 7898.)

This instruction misstated the law. (Tr. 7914.)

(o) In order to find the existence of a conspiracy, it is not necessary that you find that all

these defendants met together and formed an express agreement, for probably when men enter into a plan of the character here charged, they do not expressly agree. Much, probably, is left to unexpressed understanding and it is not necessary that there should have been any time at which all met and with any formal expression of words agreed upon a plan or a conspiracy. They are usually entered into more or less secretly and carried out in a manner so as to leave as little proof or evidence for detection by anyone later. Rarely in conspiracies is there direct proof of the purposes and intentions of the parties; but direct proof is not indispensable. The object of a conspiracy and a defendant's connection with it may be partly or entirely revealed as shown by the facts and circumstances and the reasonable inferences and conclusions to be drawn from them. But every fact and every circumstance from which the inference is drawn and a conclusion based must be proved beyond a reasonable doubt. (Tr. 7899.)

This instruction misstated the law. (Tr. 7914.)

(p) I think I should further charge you that all persons working together in the furtherance of a common design are members of the conspiracy, although the part any one is to take is subordinate, or is to be executed at a remote distance. It is not necessary that each conspirator participate in each step or stage of the common, general design. One of them may do one thing, another may do a different thing. Some may take major parts, while the participation of others may be in a minor degree. The mere knowledge,

acquiescence or approval of an unlawful act, with cooperation or agreement to cooperate, is not sufficient to constitute one a party to a conspiracy. It requires more than proof of a mere passive cognizance of a crime on the part of a defendant to sustain a charge of conspiracy to commit it. And you must find that the defendant did some act or made some agreement showing an intention to participate in some way in such conspiracy. (Tr. 7900-7901.)

This instruction misstated the law. (Tr. 7914.)

14. The trial Court committed error in refusing to give the following instructions requested by appellants:

a. Defendants' Proposed Instruction No. 2.

The Court advises the jury to find the defendants Henry Schmidt and J. R. Robertson Not Guilty.

This advice of the Court in respect to your deliberations upon the defendants Schmidt and Robertson is based upon the opinion of the Court to the end that there does not exist in the record of this case sufficient evidence to support a verdict of conviction against either of the defendants Henry Schmidt or J. R. Robertson.

Hence the Court advises you to return a verdict of Not Guilty in favor of the defendants Schmidt and Robertson. (Tr. 245.)

It was urged at the trial that the evidence and the law required this instruction. (Tr. 7616.)

b. Defendants' Proposed Instructions Nos. 18, 19 and 23.

No. 18: The credibility of a witness may be impeached by the ascertainment not only of the fact that such witness is interested in the prosecution or biased against the defendants but also by showing of the degree of such interest or bias in order that the jury may measure the depth and violence of his prejudice. (Tr. 250.)

No. 19: A witness for the prosecution in a criminal case may also be impeached by showing that such witness assisted in the preparation of the prosecution's case in order to show an unfair desire on the part of such witness to procure a conviction. (Tr. 251.)

No. 23: The jury has the right, and even the duty to compare the testimony of any witness as to the details given concerning events of the past with the lack of ability of such witness to offer details of incidents of equal importance occurring almost contemporaneously with his appearance in court.

If there is such a difference in the purported abilities of the witness, his testimony in such instances should be viewed with caution. (Tr. 254.)

These instructions stated the ordinary rules respecting the credibility of witnesses. (Tr. 7917.)

c. Defendants' Proposed Instructions Nos. 32 and 33.

No. 32: The witness, Lloyd H. Garner, an officer of the Immigration and Naturalization Service of the United States, testified, among other things, that he had certain oral interviews with

the defendant Henry Schmidt and with the defendant J. R. Robertson, respectively, during the course of which interviews he asked each of said defendants whether or not they had ever belonged to the Communist Party of the United States; he stated that each of said defendants answered this question in the negative.

The defendants Schmidt and Robertson have denied that they were ever members of the Communist Party and they have also denied that any such oral conversation with the witness Lloyd H. Garner ever took place.

In connection with the evidence outlined above, you are instructed that Rule 150.1(c) of the regulations of the Immigration and Naturalization Service provides as follows:

“All statements secured from the alien or any other person during the investigation which are to be used as evidence, should be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement
* * *”

You are advised that you may consider the applicability of the foregoing rule of the regulations of our Immigration and Naturalization Service in connection with your deliberations upon the truth or falsity of the statements thus made by the witness Lloyd H. Garner. (Tr. 258-259.)

No. 33: The Government does not contend that the defendants Schmidt and Robertson made any statement before the Superior Court of the State of California at San Francisco in the citizenship hearing of Harry Bridges concerning the issue of whether or not Bridges had ever been a member of the Communist Party. The Government does

contend, however, that, in an alleged oral interview had between the witness Lloyd H. Garner and the defendants Schmidt and Robertson, respectively, they were asked by Garner whether or not Harry Bridges was a member of the Communist Party and that they replied in the negative.

In connection with the foregoing state of evidence as well as with all evidence concerning the alleged oral interview between the witness Lloyd H. Garner and the defendants in this case, you are instructed that evidence as to alleged oral statements or admissions attributed to any of the defendants must be viewed by you with caution. (Tr. 459-460.)

These instructions were required as a matter of law in view of the evidence in the case. (Tr. 7917-7918.)

d. Defendants' Proposed Instruction No. 40.

I instruct you that a conspiracy to obtain that to which one is legally entitled is not punishable as a conspiracy to defraud the United States.

In other words, if the defendant Harry Renton Bridges was entitled to become a citizen of the United States under our laws, no conspiracy to assist him in the obtaining of his citizenship could ever be punishable as a crime. (Tr. 263.)

This instruction correctly states the law. (Tr. 7918.)

e. Defendants' Proposed Instructions Nos. 43-48, inclusive, and No. 50.

No. 43: The defendants Schmidt and Robertson are charged, in substance, with unlawfully and fraudulently conspiring to defeat the laws of

the United States by aiding Harry Bridges in his application for citizenship.

Of course, if Harry Bridges was lawfully entitled to obtain his citizenship in the United States, then no crime could have been committed by any person who aided him in the effectuation of this desire.

But one of the questions to be resolved by the jury in relation to the conduct of the defendants Schmidt and Robertson, who appeared as witnesses for the defendant Bridges upon his citizenship petition, is this:

What was the basis for the statements given by the defendants Schmidt and Robertson before the Superior Court of the State of California at San Francisco? Were the statements then and there made by the defendants Schmidt and Robertson made with reasonable reliance upon information, public or otherwise, which they then and there possessed concerning the defendant Harry Bridges?

If the jury finds that the defendants Schmidt and Robertson reasonably relied upon information of a public nature concerning the defendant Harry Bridges and that they based their testimony in the citizenship hearing of Bridges upon their reliance in the verity of such information, then they cannot be found guilty of any act of fraud, and it will become the duty of the jury to find defendants Schmidt and Robertson Not Guilty. (Tr. 264-265.)

No. 44: In support of the charges brought against them by the prosecution, the defendants Schmidt and Robertson are accused of giving the following testimony before the Superior Court

of the State of California at San Francisco in support of the petition by the defendant Harry Bridges for citizenship:

"The witnesses are both citizens of the United States?"

Answers: "Mr. Robertson: Yes." "Mr. Schmidt: Yes."

Question by you: "You each have known the petitioner for the last five years or longer?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

By you: "And you know him to be a resident of this country at this time?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

By you: "Do you each vouch for his loyalty to the United States?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

Your question: "Do you recommend him as a person of good moral character?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

"Do you recommend him to this court for citizenship?"

"Mr. Robertson: I do." "Mr. Schmidt: I do."

The defendants Schmidt and Robertson admit that they gave such testimony.

In uttering the statements, observations and/or recommendations just now read, the defendants Schmidt and Robertson were entitled to rely, not only upon such independent knowledge as each may have possessed concerning the life of Harry Bridges but they were entitled further to

base such reliance upon any public documents discussing the involved subject matter, including the opinion of the Supreme Court of the United States in the previous cause in which the deportation of the defendant Harry Bridges was attempted.

Under our law, the intent to defraud is of the essence of any alleged criminal scheme or artifice. If such essence be lacking, there is no such scheme or artifice, and hence no crime.

Hence if the defendants Schmidt and Robertson placed a reasonable reliance in the verity of the statements of the Supreme Court of the United States in the decision already mentioned and gave their testimony in the citizenship hearing of Harry Bridges based, either in whole or in part upon the language contained in such decision of our Supreme Court, then they cannot have committed any crime and they must be found Not Guilty. (Tr. 265-267.)

No. 45: If the defendants Schmidt and Robertson read the opinion of the Supreme Court of the United States in the previous cause involving the attempted deportation of Harry Bridges and believed in the statements therein made and endorsed by the Supreme Court of the United States and then and there formed their own beliefs concerning the status of Harry Bridges, relying, either in whole or in part upon such statements as uttered by the Supreme Court of the United States to the end that they, the defendants Schmidt and Robertson gave testimony before the Superior Court of the State of California at San Francisco in support of the application of defendant Harry Bridges for admission to

citizenship, relying thereon, they cannot be held to have committed any crime at all and they must be then found by you to be Not Guilty. (Tr. 267-268.)

No. 46: The defendants Schmidt and Robertson are charged with having conspired to defraud the Government of the United States and they have asserted that any statements made by them, respectively, in connection with the application of Harry Bridges for citizenship, were made upon reliance, among other things, upon the language of the Supreme Court of the United States in the previous cause in which the deportation of Bridges was attempted.

You are instructed that the matter of intent is always an essential element of fraud. Whenever the belief of a person or the motive of his act or conduct is in issue, he may not only testify directly that he had no intent to defraud, but he may buttress such statement or denial with the testimony of relevant circumstances including the reading of properly authenticated public documents contending to support his own statements.

If you find that the defendants Schmidt and Robertson, in taking part, or aiding the defendant Harry Bridges in the advancement of his petition for citizenship, read the decision of the Supreme Court of the United States in the matter referred to and relied upon the verity of the same, then they have negatived the assertion of any intent to defraud, and the jury must consider such circumstances in passing upon their guilt or innocence. (Tr. 268-269.)

No. 47: If the jury find that the defendants Schmidt and Robertson, in the formulation of

their own respective states of mind concerning the status of Harry Bridges, read and relied upon the language in the previous cause in which the deportation of Bridges was attempted, and if you further find that they were led by the language of such decision to believe in the fitness of the defendant Harry Bridges to be admitted to citizenship, in such event no crime has been proved against the defendants Schmidt and Robertson and they must be found Not Guilty. (Tr. 270.)

No. 48: If the defendants Schmidt and Robertson relied, either in whole or in part, upon the language of the Supreme Court of the United States in the previous matter involving Harry Bridges as a basis for their statements and/or recommendations concerning his citizenship petition, they then possess the right to recount the language of the United States Supreme Court upon which they thus relied to obtain the benefit of whatever persuasiveness such language may carry. (Tr. 271.)

No. 50: Willful fraud is of the essence of the accusation brought against the defendants Schmidt and Robertson.

Hence the jury may consider any testimony bearing directly upon the question of the intent or the motives of the defendants Schmidt and Robertson in giving testimony in support of the citizenship petition of Harry Bridges.

If the jury finds that the defendants Schmidt and Robertson relied upon the language of the Supreme Court of the United States in the previous cause involving the attempted deportation of Bridges and were led thereby to believe that

Harry Bridges was eligible to citizenship, they must be found Not Guilty. (Tr. 272.)

These instructions should have been given because they correctly stated the law with respect to the subject matter thereof. (Tr. 7918.)

f. Defendants' Proposed Instruction No. 67-A.

The circumstances of a case may be such that an established reputation for good character standing alone may create a reasonable doubt as to guilt, even though without such evidence of good character, the evidence of guilt might be convincing. (Tr. 284.)

This instruction should have been given since the other instructions did not adequately cover the subject. (Tr. 7918.)

g. Defendants' Proposed Instructions Nos. 74, 74-A, 76, 78, 78-A, 78-B, and 78-C.

No. 74: The presumption of innocence, which surrounds and protects any defendant accused of crime under the American system of law, is not a mere literary phrase. It is a real and practical safeguard and it derives from our constitution and from the Bill of Rights, which guarantee to our citizens their general civil liberties.

Our constitution is not a silent or anemic witness to this, or any other criminal proceeding. It will not stand idly by while one of its subjects finds his liberty endangered in the absence of the fullest proof required by law.

Thus, you are advised that the presumption of innocence surrounds each defendant in this case at the moment of his accusation. It continues to

surround each defendant during all stages of the trial and it persists even into the moments of your deliberations in the jury room.

In a proper case, the presumption of innocence alone may suffice to rebut an entire prosecution. In a case such as the present one where each of the defendants has given testimony in his own behalf, the presumption of innocence surrounds each of such defendants during the giving of his testimony.

No such presumption attaches to any witness produced by the prosecution.

Therefore, you are admonished that in your deliberations you must consider all of the evidence adduced throughout this entire case in the light of the presumption of innocence to the end that, if any reasonable doubt exists as to the guilt of any defendant, it will become your duty to find such defendant Not Guilty. (Tr. 287-288.)

No. 74-A: In a criminal case the presumption of innocence, which attaches to any defendant, takes precedence over any other presumption.

For example, as to any witness giving testimony in any particular case, a disputable presumption exists to the effect that such witness is telling the truth, although, as you have been advised, this presumption may be repelled by the character or quality of the testimony of the witness, by the witness's manner of testifying, or by impeaching or contradictory evidence.

Any ordinary presumption of our law, such as the presumption concerning witnesses, is outweighed by the presumption of innocence, which attaches only to defendants in criminal cases.

Under our system of law the presumption of innocence is so important that it is deemed better that one hundred guilty persons go free than that one innocent person should suffer an unjust conviction. (Tr. 288-289.)

No. 76: I instruct you that a reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendants are guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendants are entitled to have the benefit. I further instruct you that if you have found one fact necessarily inconsistent with the guilt of the defendants, then, in that event, you must return a verdict of Not Guilty. (Tr. 289-290.)

No. 78: The doctrine of reasonable doubt means exactly what the phrase implies. It means that state of the record, viewed conscientiously by you, in which you cannot say you feel an abiding conviction to a moral certainty of the truth of the charges.

True, an imaginary or fanciful doubt will not give rise to the operation of the doctrine of reasonable doubt because the essence of this principle of our law demands a doubt based on reason.

But if, upon your examination of the evidence there does exist a doubt based upon reason as

to whether or not the guilt of the defendants or of any defendant, has been satisfactorily shown, then it must follow that you cannot possess an abiding conviction of the truth of the charges.

The defendants are not obliged to produce the greater weight of evidence in order to entitle themselves to an acquittal, because the burden of proof, which is upon the prosecution, never changes.

All that the defendants need establish, out of the whole of the evidence, is a reasonable doubt and if a reasonable doubt does exist it will become your duty to find the defendants Not Guilty. (Tr. 290-291.)

No. 78-A: I instruct you that if you find from the evidence that any of the attorneys, representatives, or agents of the Government who are connected with the prosecution of this case, or who engaged in the preparation of this case, have offered improper inducements in any form to any person or persons to testify in this proceeding, you may conclude from such evidence that the case of the prosecution is a weak or an unfounded one. This inference is not limited to any specific fact in the case but operates against the whole mass of facts constituting the case. (Tr. 291.)

No. 78-B: I instruct you that if you find from the evidence that any of the attorneys, representatives, or agents of the Government who are connected with the prosecution of this case, or who engaged in the preparation of this case, have knowingly used false testimony for the purpose of obtaining a conviction in this case, such conduct is inconsistent with the rudimentary de-

mands of justice and you should reject the entire case proffered by the prosecution. Such conduct, if you find it to exist, constitutes a violation of the fifth amendment to the Constitution of the United States and has no place in the trial of a case in these courts. (Tr. 292.)

No. 78-C: I instruct you that if you find that any of the attorneys, representatives, or agents of the Government who are connected with the prosecution in this case, or who engaged in the preparation of this case, have concealed or attempted to conceal any documents, files, records, or parts thereof, relevant or material to any of the issues in this proceeding, or which bear or could bear on the credibility of any of the witnesses called in this proceeding, you may conclude that such files, documents, records, or parts thereof, are adverse to the prosecution, and you may further conclude that the case of the prosecution insofar as those documents are relevant and material to it, is a weak and unfounded one. (Tr. 292-293.)

These instructions should have been given because they properly stated the law with respect to the presumption of innocence and the proper role of the various parties to the litigation. (Tr. 7919.)

h. Defendants' Proposed Instructions Nos. 79-83, inclusive.

No. 79: I instruct you that the Supreme Court of the United States on June 18, 1945, delivered an opinion wherein it reversed a judgment of the lower federal courts which had denied the defendant Bridges' application for a writ of habeas corpus which he sought to procure his release

from the custody of the Attorney General of the United States who was holding him in custody on a warrant for his deportation based upon a charge that the defendant Bridges was or had been a member of the Community Party in the United States.

In view of these circumstances I instruct you that you are not to consider any evidence in this case relating to the defendant Bridges' alleged membership in the Communist Party in the United States prior to the 18th day of June, 1945, those matters having been previously adjudicated. (Tr. 293-294.)

No. 80: I instruct you that the Board of Immigration Appeals, an agency of the Department of Justice, did on January 3, 1942, direct that a certain warrant of arrest against the defendant Bridges be cancelled and that certain proceedings against him be closed. That warrant of arrest and those proceedings were directed toward the deportation of the defendant Bridges and were based upon a charge that the defendant Bridges was or had been a member of the Communist Party in the United States.

In view of these circumstances I instruct you that you are not to consider any evidence in this case relating to the defendant Bridges' alleged membership in the Communist Party in the United States prior to the 3rd day of January, 1942, those matters having been previously adjudicated. (Tr. 294.)

No. 81: I instruct you that pursuant to a warrant issued by the Attorney General of the

United States under the applicable statutes, a hearing inquiring into the charges that the defendant Bridges was or had been a member of the Communist Party in the United States was concluded before a presiding Inspector of the Immigration and Naturalization Service of the Department of Justice on July 12, 1941, and that thereafter pursuant to subsequent legal proceedings in that case the said warrant was cancelled and the proceedings closed.

In view of these circumstances I instruct you that you are not to consider any evidence relating to the defendant Bridges' alleged membership in the Communist Party in the United States prior to the 12th day of July, 1941, those matters having been previously adjudicated. (Tr. 294-295.)

No. 82: I instruct you that on the 8th day of January, 1940, the Secretary of Labor, who at that time under the laws of the United States was the officer charged with such matters, cancelled a warrant which had been previously issued for the deportation of the defendant Bridges. This warrant had been issued upon the ground that the defendant Bridges was a member of the Communist Party. The cancellation of the warrant occurred after the Secretary of Labor accepted the findings of a Trial Examiner appointed pursuant to the applicable statutes to inquire into the truth or falsity of the charges.

In view of these circumstances I instruct you that you are not to consider any evidence in this case relating to the defendant Bridges' alleged membership in the Communist Party of the

United States prior to the 8th day of January, 1940, those matters having been previously adjudicated. (Tr. 295-296.)

No. 83: I instruct you that pursuant to a warrant issued by the Secretary of Labor of the United States under the applicable statutes, a hearing inquiring into the alleged membership of the defendant Bridges in the Communist Party was concluded before a Trial Examiner on September 14, 1939, and that thereafter pursuant to subsequent legal proceedings the said warrant was cancelled and the proceedings closed.

In view of these circumstances I instruct you that you are not to consider any evidence relating to the defendant Bridges' alleged membership in the Communist Party of the United States prior to the 14th day of September, 1939, those matters having been previously adjudicated. (Tr. 296.)

These instructions should have been given because they properly state the law with respect to the applicability of the doctrine of *res judicata* to these proceedings. (Tr. 7919.)

15. The trial Court committed prejudicial error in questioning the witness Meinecke and making statements in the presence of the jury concerning his purpose in asking certain questions of the said witness.

16. The Court erred in sustaining the following question addressed to the government witness Paul Crouch: "Have you been in any institution for nervous and mental disorders?"

17. The trial Court erred in sustaining the objection to the question asked the government witness Louis H. Michener: "And he has treated you for mental illness in '44, hasn't he?"

18. The trial Court committed prejudicial error in reading before the jury a statement of his reasons for refusing to permit counsel for the defense to cross-examine government witness Kessler concerning his activities in preparing the case against appellants.

19. The trial Court erred in denying the motion of appellants Schmidt and Robertson in arrest of judgment insofar as said motions related to the third count of the indictment.

20. The trial Court erred in denying the motions of each of the appellants for a new trial.

21. The trial Court erred in making its opinion, order and decree revoking appellant Bridges' citizenship because:

(a) It had no jurisdiction to proceed at all in the premises because an appeal was pending in this Court.

(b) The "conviction" did not have the finality which is required as a matter of law before the provisions of 8 U.S.C.A. 738(e) can be operative.

(c) Appellant Bridges was not convicted under any chapter of the Nationality Code as required by 8 U.S.C.A. 738(e).

(d) Appellant Bridges was not convicted of knowingly procuring naturalization in violation of law as required by 8 U.S.C.A. 738(e).

BACKGROUND OF THE CASE.

An indication of the background out of which this prosecution arose appears in the Introductory Statement, *supra*. In order for the meaning and significance of this case to be fully appreciated, however, it is necessary to relate here something of the history of the chief appellant, and the events of the last fifteen years in connection with the efforts of the Government first, to secure his deportation, and second, to secure his imprisonment. Normally the personal or even the social, economic or political history of a defendant would be regarded as immaterial in a criminal prosecution. However where, as here, that history is part and parcel of the case and is so interwoven with it as to make impossible a complete understanding of the case without it, it is material.

Harry Renton Bridges was born in Australia in 1901 (Tr. 4717.) As a young man he was exposed to the liberal trade union and mildly socialistic political philosophy which obtained in that commonwealth during the early years of this century. (Tr. 4726-4734.) A sense of adventure compelled him to leave his relatively well-to-do family and comfortable employment in Australia and go to sea. (Tr. 4719.) After four or five years at sea, he made a legal entry into the United States in 1920. (Tr. 4735.) After some maritime employment on American vessels which included a short tour of duty with the United States Coast and Geodetic Survey (Tr. 4738), he settled in San Francisco in 1922 or 1923 and became a longshoreman. (Tr. 4740.) Until 1934 he continued to earn his living

as a longshoreman and was indistinguishable from the thousands of other men who worked on the San Francisco waterfront during this period.

Due to the desperate conditions under which longshoremen were employed during those years, and undoubtedly spurred on in large measure by the impetus which President Roosevelt's "New Deal" gave to the organization of trade unions, there occurred in San Francisco in 1933 a revival of the International Longshoremen's Association, a trade union which had been relatively quiescent during the 1920's. (Tr. 4771-4775.) Bridges became a member of that organization and one of those who sought to have it adopt a bolder and more progressive program than its conservative leaders would permit. (Tr. 4775-4782.)

Henry Schmidt, too, was a longshoreman and a member of the union, and it was in those early days that he first met Bridges. (Tr. 4099.) Schmidt, born in Germany in 1899, had been brought as a boy to Canada and then to the United States by his father. (Tr. 4096.) He has lived in San Francisco since 1917 and was naturalized here a quarter of a century ago. (Tr. 4096-7.) Schmidt has long been active in the affairs of the San Francisco local of the longshoremen's union having, in addition to holding other offices, served as its president for many years.

Those who shared Bridges' views of what was proper Union program succeeded in the summer of 1933 in electing a considerable number of their supporters to the executive board of the San Francisco

local (Tr. 4790), and from that time on continued to exert a growing influence upon the union. (Tr. 4801.) As the events of that period rapidly unfolded, Bridges assumed an increasingly more significant position in the union, and when the strike erupted in May of 1934, he was elected chairman of the strike committee. (Tr. 4807.) Several months later, when the strike was settled and the men had gone back to work, they showed their support of Bridges' policies and activities by electing him President of the San Francisco local at its next election in September of 1934. (Tr. 43, 4802.) Some two years later, at the next regular election of the officers of the Pacific Coast District of the International Longshoremen's Association, the members of that association showed their confidence in the policies and program of Bridges by naming him their Pacific Coast District President. (Tr. 43, 4975, 4984-4985.) He has held that office ever since.¹³

Without reviewing in detail Bridges' work since 1934, it can be said that its principal, and for the most part successful, objective has been to remove from the lives of the longshoremen on the Pacific Coast what the judges of this very Court have described as "most vicious and inhumane practices". (*Bridges v. Wixon*, 144 F.2d 927, 938 [9 Cir., 1944].)

¹³In 1938 the Pacific Coast District of the International Longshoremen's Association withdrew from that organization and became the present International Longshoremen's and Warehousemen's Union. This action was taken pursuant to a secret referendum ballot of the membership of the Pacific Coast District. (Tr. 4953-4954.) Bridges has continued as President of the International Longshoremen's and Warehousemen's Union since that time.

As the union grew and expanded following the 1934 strike, workers in terminals and warehouses were organized by it. Appellant Robertson was a warehouseman who later became an official of the union. Robertson, born in Texas in 1905 (Tr. 4626) and now residing with his wife and two young children in Mill Valley, has been chiefly concerned with the problems of warehousemen and their organization. He is today, and was at the time the indictment was returned, a Vice-President of the International Union. (Tr. 150, 4555.)

In more recent years Bridges and his associates have devoted much of their time and effort to assisting the workers in Hawaii in their struggle against the feudal social, economic and political structure which obtains in that territory. (Tr. 4914-4917.) An inkling of the conditions against which Bridges and the union were and are struggling in Hawaii is found in a decision in which the trial judge below participated. (*I.L.W.U. v. Ackerman*, 82 F.Supp. 65 [DC Hawaii, 1949].)¹⁴

From the time of Bridges' legal entry into the United States in 1920 until the strike of 1934, the agencies of Government had no apparent concern with Bridges, with the question of his membership in, or affiliation with, any organization, or with his social, economic and political views, whatever they might

¹⁴Reversed, on grounds not here germane. (*Ackerman v. I.L.W.U.* 187 F.2d 860 [9 Cir., 1951].)

have been. (Tr. 43, 44.) It is more than coincidence that it was only after an unrelenting and notably successful struggle to mitigate the economic exploitation of longshoremen and other workers that first private agencies and then, unfortunately (not so much for Bridges, but for the very processes of government itself), agencies of Government undertook to wage a "concentrated and relentless crusade"¹⁵ against him, and undertook that whole series of investigations and hearings which make up the background of this case and which ultimately culminated in the present prosecution.

That crusade is unique in the annals of American legal history and is one which, irrespective of the ultimate fate of Harry Renton Bridges, the people and the Courts of the United States might well ponder. It is alarming not so much because of what it can or may ultimately do to the three individuals directly involved here, but because it represents a distortion of governmental process for the purpose of achieving a preconceived end and, if permitted to succeed, will make a mockery of the proud boast that ours is a government of laws and not of men.

Until the commencement of the present proceedings, the protagonists of this crusade functioned primarily through the executive and legislative branches of government. The Courts were not called upon to act as "instruments of executive expedience". (*Bridges v. United States*, 184 F.2d 881, 887 [9 Cir., 1950].) It is disheartening to realize that the trial

¹⁵*Bridges v. Wixon, supra*, 157.

Court herein did not resist the pressure to become a "mere instrument for carrying into effect the arbitrary will * * *" of the executive. (*Ibid.*) As we shall show, this attitude of the trial judge was not limited exclusively to the revocation of bail, but permeated the entire course of the trial and manifested itself clearly in a variety of ways and in a variety of situations.

Even the sketchiest outline of the crusade against Bridges illustrates its sordid nature and character and the intensity with which it has been pressed, irrespective of the fact that throughout the years decent, self-respecting, law-abiding Americans, including Americans in high position, have condemned it and have stated that it is a burden on the conscience of the American people. (Tr. 6497.)

The first evidence we have of the existence of efforts to deport Bridges is a report of the San Francisco District Director of Immigration and Naturalization made late in 1934. This report reveals that an investigation of Bridges' status had been undertaken by the District Director who worked closely with, and was aided and assisted by, the San Francisco Police Department. The District Director reported that his investigation had "failed to show that he [Bridges] is in any manner connected with the Communist Party, or any radical organization". (Tr. 47.) The District Director also reported that the San Francisco Police Department had "likewise been unable to obtain any evidence that the alien [Bridges] has ever been a member of the Communist Party or in any

manner directly affiliated therewith, or a member of any radical organization". (Tr. 47.)

Despite this report, private interests continued to press the Secretary of Labor (who in those years had jurisdiction over the Immigration and Naturalization Service) to secure the deportation of Bridges. In response to such pressure, the Commissioner of Immigration and Naturalization appointed three of his key staff officers to investigate the charges against Bridges. A memorandum, prepared in 1936 by these officers, reviewed all of the available data and concluded:

"In short, whenever any legal ground for the deportation of Bridges has been brought to the attention of the Department of Labor, it has been investigated but, invariably, it has been found that he was in the clear, and that his status as an immigrant was entirely regular." (Tr. 49.)

One would have thought that after these three investigations¹⁶ and the conclusions therein reached,¹⁷ the matter would have been put at rest, at least administratively. However, the pressure of powerful private groups—and some public agencies¹⁸—continued

¹⁶By the San Francisco Police Department, by the San Francisco District Director of Immigration and Naturalization, and by the staff of the Commissioner of Immigration and Naturalization in Washington, D.C.

¹⁷Conclusions which it must be assumed represented the "best" results obtainable by agencies which there is no reason to believe were at least not hostile to Bridges.

¹⁸The groups behind the campaign were shown in the hearing before Dean Landis, to which reference is made later, to have been primarily the Subversive Activities Committee of the American Legion and, strangely enough, the Portland Police Department.

unremittingly upon the Secretary of Labor and the Commissioner of Immigration and Naturalization, and, disregarding applicable principles of administrative *res judicata*,¹⁹ the Secretary of Labor caused another investigation into the same subject matter to be conducted by the solicitor of her department. In the course of this investigation Bridges was put under oath by the solicitor and was interrogated concerning the contention that he was or had been a member of the Communist Party, a contention which is the basis for the indictment in this very case. Bridges testified that he was not and had not been a member of the Communist Party or of any organization which believed, taught or published matters teaching or advocating the overthrow of the Government by force, and that he himself did not believe or advocate such doctrines. (Tr. 49-50.)

Thus by the end of 1937 there were in the files of the Secretary of Labor at least four distinct reports indicating that the charges against Bridges were unfounded. Again, one would have thought that a decent respect for orderly administrative process would have required that the investigations terminate and that the harassment of Bridges cease. But one who so thought would have reckoned without the tremendous pressures that were brought to bear upon

¹⁹*Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922); *United States ex rel. Girard v. Helvering*, 301 U.S. 540 (1937); *Choy Yuen Chan v. United States*, 30 F.2d 516 (9 Cir., 1929); *George H. Lee Co. v. Federal Trade Commission*, 113 F.2d 583 (8 Cir., 1940); *United States v. Willard Tablet Co.*, 141 F.2d 141 (7 Cir., 1944).

agencies of the Government to achieve the desired result.

As a result of such pressures, the Secretary of Labor in 1938 issued a warrant for the arrest of Bridges with a view toward his deportation upon the ground that he was a member of or affiliated with the Communist Party of the United States. (Tr. 50-54.) The contention of the Government was the same as the claim which it had theretofore investigated and resolved in Bridges' favor. It is the same contention which is the basis of the indictment in the present case. A hearing²⁰ was held on this warrant before a specially appointed examiner, the Honorable James M. Landis, former Dean of the Harvard Law School and former Chairman of the Securities and Exchange Commission. The issues framed by the warrant were thoroughly litigated. The Government introduced 138 exhibits on its behalf, and 136 were introduced on behalf of Bridges; a total of 60 witnesses were sworn and appeared; the stenographic transcript of the hearing comprises some 7700 pages. (Tr. 53.) Thereafter, the matter was thoroughly briefed and the Examiner, on December 28, 1939, transmitted his findings and conclusions to the Secretary of Labor. These findings and conclusions are based upon an exhaustive and painstaking analysis of the record before him. The conclusion upon the

²⁰Bridges himself requested such a hearing because he thought that it would put an end once and for all to the harassment to which he had been subjected over the three or four preceding years. (Tr. 4895.) How naive he was in his belief is demonstrated by the balance of this melancholy history.

entire record was that the evidence established neither that Bridges was a member of nor that he was affiliated with the Communist Party of the United States of America. The Secretary of Labor approved this conclusion and cancelled the warrant of deportation. (Tr. 55.)

Thus, by the beginning of 1940, there were as a matter of public record at least five separate and distinct reports, one of which, while possibly quasi-judicial in form, represented in fact the judicial process at its best, in that it involved a full-dress hearing with a complete receipt of evidence on both sides, a thorough briefing of the issues involved, and a careful judicial analysis of the evidence presented,²¹ all arriving at the same conclusion, to-wit, that Bridges was neither a member of, nor affiliated with, the Communist Party.

The publication of the Landis report, instead of putting at rest once and for all the controversies raging around Bridges, only led to increased demands that he be deported. Since partisans of his deportation had failed of their purpose in the executive (administrative) forum, and since there was no basis upon which they could proceed in the judicial forum, they chose to make a direct legislative attack upon Bridges. The fact that they did so shows the intensity (as well as the unconstitutionality) of their drive. A special bill was passed by the House of Representatives directly the Attorney General forth-

²¹See Mr. Justice Frankfurter, concurring in *Adamson v. California*, 332 U.S. 46, 59 (1947).

with to take Bridges into custody and to deport him “notwithstanding any other provisions of law” (H.R. 9766, 76th Cong., 3d Sess.). The bill died in a Senate Committee after Attorney General (now Mr. Justice) Jackson denounced it as contrary to one hundred and fifty years of American legal tradition, and a clear violation of constitutional provisions. (S. Rep. 2031, 76th Cong., 3d Sess., p. 9.)

Thereupon, and presumably to give a semblance of legality to its conduct, Congress amended the deportation law, overturning a Supreme Court decision (*Kessler v. Strecker*, 307 U.S. 22 [1939]) in the process. It is clear that this legislative reversal of the Supreme Court of the United States was motivated in large part by a desire to make it possible to proceed again against Bridges. The author of the amendment did not conceal his purpose. He said:

“It is my joy to announce that this bill will do, in a perfectly legal constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges and all others of similar ilk.” (86 Cong. Rec. 9031.)

The prophecy was quickly realized. The new Attorney General, Francis Biddle, directed the Federal Bureau of Investigation to reopen the Bridges case, and, after having received a report from that agency—a report, incidentally, which impugned the integrity of Dean Landis—issued a new warrant in 1941 (Tr.

56-58) for the arrest and deportation of Bridges upon substantially the same grounds set forth in the earlier warrant. Pursuant to this warrant a hearing upon the same old issue (whether or not Bridges was or had been a member of, or affiliated with, the Communist Party) was held before Charles B. Sears, duly designated as the Presiding Inspector. This hearing, like the Landis hearing, was a very exhaustive one. The Government introduced 297 exhibits on its behalf, and 62 were introduced on behalf of Bridges; a total of 63 witnesses were sworn and appeared, only two of whom were witnesses in the 1939 hearing before Dean Landis, both of them having on that occasion appeared on behalf of Bridges; and the stenographic transcript ran to upwards of 7500 pages. (Tr. 59.) The matter was briefed, argued and exhaustively litigated.

This litigation was finally determined in Bridges' favor by a decision of the Supreme Court of the United States in 1945. (*Bridges v. Wixon, supra.*) The stages of the proceedings which intervened from the time of the hearing before Judge Sears to the decision of the Supreme Court are succinctly summarized by Mr. Justice Douglas:

"The inspector designated to conduct the hearings and make a report, Hon. Charles B. Sears, found * * * that after entering this country Harry Bridges had been affiliated with both organizations [the Communist Party and the Marine Workers Industrial Union] and had been a member of the Communist Party. He recommended deportation. The case was heard by the Board

of Immigration Appeals which found that Harry Bridges had not been a member of or affiliated with either of those organizations at any time after he entered this country. The Attorney General reviewed the decision of the Board and rendered an opinion in which he made findings in accordance with those proposed by the inspector and ordered Harry Bridges to be deported. A warrant of deportation was issued. Harry Bridges surrendered himself to the custody of the respondent and challenged the legality of his detention by a petition for a writ of *habeas corpus* in the District Court for the Northern District of California. That court denied the petition and remanded petitioner to the custody of respondent. 49 F.Supp. 292. The Circuit Court of Appeals affirmed by a divided vote. 144 F.2d 927, 944. The case is here on a petition for a writ of certiorari which we granted because of the serious character of the questions which are presented." (*Bridges v. Wixon*, 326 U.S. 135, 139-140.)

The judgment of this Court, affirming the District Court's order denying the application for habeas corpus, was reversed on the grounds that the deportation order was based upon a misconstruction of the term "affiliation" used in the applicable statute, and that the hearing on the question of Bridges' membership in the Communist Party was unfair because of the receipt of inadmissible and highly prejudicial hearsay evidence. (*Bridges v. Wixon*, *supra*, at 156.)

This decision of the Supreme Court was announced on June 18, 1945. It represented what men could reasonably have believed would be the final step in

the "relentless crusade". This had been a crusade which had never before been witnessed in this land. At no time in American administrative or judicial history had there been four, five or six separate and distinct investigations into the same subject matter, all of which ultimately reached the same result and conclusion.

The Supreme Court having finally put an end to this invasion of his constitutional²² rights and thereby having removed all obstacles, Bridges immediately pressed his pending application for citizenship. Five days after the decision of that Court, he took the steps which led to his becoming naturalized some three months later, and which also led to the present indictment and conviction against him.

One would have thought that the forces which were behind the crusade against Bridges would have acknowledged their defeat with the decision of the Supreme Court in 1945, and would have withdrawn from the field of combat. However, as the record in the present case demonstrates, they did no such thing. It may be surmised that for a year or two after the naturalization in 1945, Bridges' adversaries were satisfied to accept the final determination of the Supreme Court. But with the rise of international as

²²Mr. Justice Murphy noted that

"* * * the Constitution has been more than a silent and anemic witness to this proceeding. It has not stood idly by while one of its subjects is being excommunicated from this nation * * * When the immutable freedoms guaranteed by the Bill of Rights have been so openly and concededly ignored, the full wrath of constitutional condemnation descends upon the action taken by the Government." (*Bridges v. Wixon*, *supra*, at 161-162.)

well as domestic tensions in 1947, it became apparent that those who feared and opposed Bridges' viewpoint and influence upon the longshoremen and other workers on the Pacific Coast, determined at all costs to rid themselves of that influence. Not only did the Attorney General make it plain a year and a half before this prosecution was instituted that the Government intended to remove Bridges from his trade union position, not because of any crime he allegedly committed but because of his alleged viewpoint, and because of the exigencies of the international situation (Tr. 6072-6074); but on the very eve of this prosecution that same officer made it clear that in his view the prosecution was achieving a predetermined objective with respect to the settlement of economic controversies in the Hawaiian Islands. (Tr. 73-76, 146.)

It is not surprising that the chief proponents of a persecution such as we have outlined above should not be too concerned about the means which they used to achieve their end. As the late Justice Murphy pointed out, "Wire-tapping, searches and seizures without warrants and other forms of the invasion of the right of privacy have been widely employed in this deportation drive." (*Bridges v. Wixon*, 326 U.S. 135, 159.) Both Dean Landis and Judge Sears had occasion to characterize the witnesses produced by the Government in a manner which left little doubt of the fact that every one of them perjured himself when he swore that Bridges was a member of the Communist Party. Both Dean Landis and Judge Sears, furthermore, were compelled to find in their respective cases

that the Government had used improper inducements to obtain perjured testimony and that the Government had engaged in a violation of the federal wire-tapping statutes in connection with the deportation drive. One of the judges of this Court has said that the evidence produced before Judge Sears "would be condemned and proscribed without hesitation by any American court". (*Bridges v. Wixon*, 144 F.2d 927, 943.)

A striking feature of both the present effort to imprison Bridges and the earlier efforts to deport him is that in both governmental process was not invoked in good faith to enforce deportation or penal statutes, but was made an instrument to achieve certain political objectives and silence criticism and dissent.

Bridges and the other appellants are not being prosecuted here because of any real concern by the Department of Justice that Bridges did or did not testify falsely before Judge Foley; they are being prosecuted here because of a great concern by the Department of Justice that their position of leadership and influence upon the longshoremen of the West Coast, coupled with their viewpoint respecting certain social and political problems, may represent an impediment to the carrying out of certain policies of the present Administration.

The ultimate proof came with the Government's efforts, acquiesced in by the trial Court, to deprive Bridges of his liberty in July of 1950 by the device of seeking to have his bail revoked. Although the Government had maintained throughout the trial that the case was a simple perjury prosecution, its motive

became crystal clear when it sought to imprison Bridges because he expressed his views and opinions upon matters of foreign policy. Despite the fact that his appeal to this Court admittedly presented substantial questions for determination and was being prosecuted by him in good faith, the trial Court, basing its action on Bridges' expressions of opinion, caused him to be imprisoned at the Government's behest.

Whether or not the judges of this Court agree or disagree with Bridges' views is beside the point. The point which the judges of this Court must consider is whether they, as such judges, will permit a department of Government to utilize the judicial processes of the United States for the purpose of achieving what are plainly and palpably political ends. As the Supreme Court said in *Douglas v. Jeannette*, 319 U.S. 157 (1943), no person is immune from a prosecution *instituted in good faith*. Conversely, all persons must be held immune from prosecutions instituted in bad faith or for improper motives. No Court can permit the law to be made an instrument in the hands of those temporarily vested with the authority of the state to achieve their transient ends without at the same time destroying the integrity of the law.

Another feature of the deportation proceedings on the one hand, and the present criminal proceeding on the other, is the similarity of the methods by which evidence was sought and the nature and character of what was obtained. A comparison of the record in this case with the records before Dean Landis and

Judge Sears brings to mind the aphorism that a leopard cannot change his spots. Even the most superficial reading of the record in the present case demonstrates that every reason which compelled both the Dean and the Judge to reject the testimony of the witnesses proffered by the Government in their respective cases, exists here. Witnesses gave testimony which could not, from the physical facts adduced, possibly have been true. One witness had for about a quarter of a century been living a life which was a total lie. (Tr. 2166 *et seq.*) Another witness' testimony was bought and paid for by the sheerest and most transparent of devices. And yet here the Government prosecutors fought more vigorously (Tr. 2143 *et seq.*) (if that was possible) than did their predecessors in the two previous hearings to protect and cover up for the witnesses they put on the stand. In this they were aided by the rulings of the trial Court, which threw a protective mantle around the shoulders of those witnesses (Tr. 3580 *et seq.*) and made it well-nigh impossible for the appellants to use the only weapon at their command—the weapon of cross-examination—to pierce the tissue of lies which emanated from the Government's witnesses.

The testimony upon which the Government seeks to imprison appellants in this proceeding cannot be described in any terms more charitable than those heretofore used to characterize the evidence upon which Bridges' deportation has been sought. An analysis of the record herein will show that the Government's witnesses in the instant case must be con-

demned in harsher and more stinging language than employed by previous judges in the earlier cases.

This, then, is the background against which this case must be judged.

We shall demonstrate in this brief that, as a matter of law, this prosecution should have never been begun or been permitted to go to trial. We shall demonstrate that the evidence does not support the jury's verdict. We shall demonstrate that at the trial, appellants were not accorded that fairness and impartiality from the Court to which they were entitled.

SUMMARY OF ARGUMENT.

1. The prosecution of all appellants on all counts is outlawed by the statute of limitations. The War-time Suspension clause does not apply to this case. Neither does the "savings clause" of the Act of June 25, 1949.

2. Appellant Bridges was denied due process of law, was subjected to double jeopardy, and was deprived of the benefits of the doctrine of *res judicata* by the succession of proceedings against him concerned with the same issue of fact.

3. None of the counts of the indictment state facts sufficient to constitute an offense against the United States. The alleged false answer which is the basis of the first and second counts of the indictment was to an immaterial question. The third count does not

state facts to bring it within any known statutory crime.

4. The evidence is insufficient to sustain a conviction under the indictment. There is no direct evidence of a conspiracy. There is no circumstantial evidence from which a jury could infer the existence of a conspiracy. There is no evidence that appellants Robertson and Schmidt were guilty of aiding or assisting appellant Bridges to procure naturalization in violation of law.

5. The trial Court erred in unduly restricting the cross-examination of Government witnesses and in preventing appellants from showing the interest, bias and mental state of such witnesses. It also erred in its own examination of defense witnesses.

6. The trial Court erred in improperly instructing the jury and in failing to give appropriate and necessary instructions.

POINT I.

THE STATUTE OF LIMITATIONS OUTLAWS THIS PROSECUTION.

(Specification of Errors, 1-3.)

THE PROBLEM.

The indictment was returned on May 25, 1949, and alleges that the crimes charged were committed "on or about the 23rd day of June, 1945, and continuing thereafter until on or about October 1, 1945, and for some time prior thereto" (Count 1), and "on Sep-

tember 17, 1945'' (Counts 2 and 3). Therefore, more than three years elapsed from the commission of the alleged crimes to the return of the indictment.

On the date on which the indictment was returned and for some nine months prior thereto, the statute of limitations applicable to criminal proceedings read as follows:

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.” (18 U.S.C.A. 3282.)

On the face of it, therefore, this prosecution is outlawed.

The trial Court, however, held that appellants were not protected by the three-year statute of limitations. It adopted the argument of the Government which was substantially this:

(1) The three-year statute of limitations applicable to Count 1 of the indictment was suspended for the duration of the war by the Wartime Suspension of Limitations Act. (18 U.S.C.A. 3287.)

(2) As to Counts 2 and 3 of the indictment:

(a) The Suspension Act also tolled the running of the statute of limitations since “fraud” was “implicit” in all counts of the indictment. (*United States v. Bridges*, 86 F. Supp. 922, at 927.)

(b) §21 of the Act of June 25, 1948—the statute enacting the new Title 18 of the United

States Code—"saved" the prosecution from the effect of the three-year limitation and imposed upon it the five-year limitation found in 8 U.S.C.A. 746(g), despite the fact that the latter statute had been repealed effective September 1, 1948.¹

Neither of these contentions² is sound.

SUMMARY OF ARGUMENT.

1. The Suspension Act (18 U.S.C.A. 3287) is not applicable to the offense described in the indictment. That Act suspends statutes of limitations "applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner whether by conspiracy or not * * *"³

¹The recodification of Title 18 had no effect on the period of limitations applicable to Count 1 of the indictment since both before (18 U.S.C.A. [old] 582) and after (18 U.S.C.A. 3282) September 1, 1948, the normal period of limitations for the crime of conspiracy was three years.

²The Government also contended that the general saving clause—1 U.S.C.A. 109—was applicable to the indictment. But the trial Court having ruled for the Government upon the grounds mentioned in the text, found it unnecessary to give consideration to this contention. (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].) Consequently we will not discuss this matter in the opening brief. Should the Government urge this ground upon the Court, we reserve the right to discuss 1 U.S.C.A. 109 in our reply brief. We note, however, that the Government's contention has recently been rejected by the Court of Appeals for the Second Circuit. (*United States v. Obermeier*, 186 F.2d 243 [Cir. 2, 1950], cert. den. U.S., 71 S. Ct. 573, 95 L. ed. 452 [1951].)

³The Suspension Act as it appears in 18 U.S.C.A. 3287 is identical, except for changes in phraseology, with former 18 U.S.C.A. 590(a) (Revisers Note, 18 U.S.C.A. 3287).

It is not applicable in any case unless at least two requirements are present in the statute defining the offense: (1) the purpose or intent to defraud the United States, and (2) pecuniary or property loss to the United States.

In a series of cases decided in the 1920's and 1930's⁴ the Supreme Court construed the 1921 proviso to the general statute of limitations and the 1926 proviso to the Revenue Act of 1926, which both are in pertinent part identical predecessors of the Suspension Act, as applicable only to offenses in which intent to defraud is an element of the statute defining the offense. Numerous lower Court cases without exception are to the same effect. When Congress enacted the Suspension Act in 1942, employing the essential language of the 1921 and 1926 provisos, it adopted the construction given by the Courts to such language and made it a part of the indictment.

“Fraud” *as used in the Suspension Act*, means the causing of pecuniary or property loss to the United States. This is the primary and ordinary meaning of the word and there are no apt words in the Suspension Act extending its meaning to a broader scope, such as the words “for any purpose” which appear in the general conspiracy statute. Provisions of the Contract Settlement Act and the Surplus Property Act, of which the Suspension Act was a part before the recodification of Title 18, emphasize that “fraud” in the Suspension Act is limited to its

⁴*United States v. Noveck*, 271 U.S. 201 (1926); *United States v. McElvain*, 272 U.S. 633 (1926); *United States v. Scharton*, 285 U.S. 518 (1932).

primary meaning. The reports accompanying the bill which became the Suspension Act⁵ demonstrate a legislative intent to limit suspension to offenses involving pecuniary or property loss to the United States. The Court of Appeals for the District of Columbia⁶ and the Court of Appeals for the Second Circuit⁷ so construed the statute in cases which are dispositive of the issue here.

Neither intent to defraud nor pecuniary or property loss to the United States is an element of the offenses charged in the second and third counts of the indictment. Likewise, pecuniary or property loss to the United States is not an element of the offense charged in the first count of the indictment. In fact, the Court below so held. (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

Therefore, since the Suspension Act is applicable only to offenses in which both intent to defraud and pecuniary or property loss to the United States are elements, and since intent to defraud and pecuniary or property loss to the United States are not elements of the offenses here charged, the Suspension Act is not applicable to this proceeding.

2. §21 of the Act of June 25, 1948, does not save this prosecution from the effect of the three-year statute of limitations. It does not preserve to the United States the cause of action after the three-year

⁵See Appendix.

⁶*Marzani v. United States*, 168 F.2d 133 (App. D.C., 1948, affirmed by a divided court 335 U.S. 895 (1948)).

⁷*United States v. Obermeier*, *supra*.

period has run. The Court of Appeals for the Second Circuit has so construed that section in a case which is dispositive of the issue here.⁸ §21 repeals specifically enumerated provisions of the Revised Statutes and the Statutes at Large, including the five-year statute of limitations found in 8 U.S.C.A. 746(g), which were inconsistent with the provisions of the new Title 18, and provides “any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.”

The legislative history of Title 18 demonstrates that Congress intended to codify into one harmonious whole the criminal law of the United States, and that §21 was enacted for the express purpose of removing from the statute books laws which were inconsistent with that purpose. It was not the purpose of §21 to bring back into the Criminal Code matter which the Congress sought to delete from it. The legislative history of the three-year statute of limitations (18 U.S.C.A. 3282) demonstrates that Congress deliberately intended to eliminate the five-year statute of limitations of the old Nationality Code. The use of the words “rights or liabilities” in §21 indicates that Congress did not intend to refer to procedural matters such as periods of limitations. Other legislation establishes that Congress was familiar with the appropriate method of treating with periods of limitation when it so intended.

3. Statutes of limitations are statutes of repose and are to be construed liberally in favor of the accused

⁸*United States v. Obermeier, supra.*

and strictly against the Government. Provisos which make exception to, or limit the operation of, statutes of limitations are to be construed strictly against the Government and liberally in favor of the application of the general statute of limitations.

ARGUMENT.

I.

THE SUSPENSION ACT IS NOT APPLICABLE TO THIS CASE.

The precise issue as to whether or not the three-year statute of limitations is suspended turns on whether the Suspension Act, which applies to offenses involving "fraud or attempted fraud against the United States * * * in any manner, whether by conspiracy or not," applies to the offenses here, which are substantially, first, a conspiracy to defraud the United States by making a false statement in a naturalization proceeding, second, the making of such a false statement, and third, aiding the unauthorized procurement of naturalization.

To determine this issue it is necessary to consider the legislative history and applicable decisions of the Courts relating to the Suspension Act on the one hand, and to the offenses here charged on the other.

A. ITS HISTORY AND JUDICIAL INTERPRETATION DEMONSTRATE THAT THE SUSPENSION ACT IS NOT APPLICABLE UNLESS INTENT TO DEFRAUD THE UNITED STATES AND PECUNIARY OR PROPERTY LOSS TO THE UNITED STATES ARE ELEMENTS OF THE OFFENSE CHARGED.

(1) Background of the Suspension Act.

The essential wording of the Suspension Act, "fraud or attempted fraud against the United States * * * whether by conspiracy or not and in any manner" (18 U.S.C.A. 3287) derives originally from a proviso to the general three-year statute of limitations added on November 17, 1921 (c. 124, §1, 42 Stat. 220) in connection with war frauds arising out of the first world war. This 1921 proviso read:

"Provided, however, that any offenses involving the *defrauding or attempts to defraud the United States* or any agency thereof, *whether by conspiracy or not, and in any manner*, and now indictable under the existing statutes, the period of limitations shall be six years * * *" (Italics added.)

This proviso was construed by the Supreme Court in *United States v. Noveck*, 271 U.S. 201 (1926) and *United States v. McElvain*, 272 U.S. 633 (1926). A proviso in the Revenue Act of 1926 (Feb. 26, 1926, c. 27, §1110[a], 44 Stat. 114) in identical language was further construed by the Supreme Court in *United States v. Scharton*, 285 U.S. 518 (1932). To overcome the effect of these decisions, which held the language of the provisos inapplicable to the offenses charged, the Revenue Act of 1926 was amended. (See *Braverman v. United States*, 317 U.S. 49, 54-55 [1942].)

Shortly after the United States became involved in the second world war, the Act of August 24, 1942 (c. 555, §1, 56 Stat. 747) was passed. This Act provided in pertinent language identical with that of the 1921 and 1926 provisos as follows:

“The running of any existing statute of limitations applicable to any offense against the laws of the United States, involving *defrauding or attempts to defraud the United States, whether by conspiracy or not, and in any manner* and now indictable under any existing statutes shall be suspended until June 30, 1945, or such earlier time as the Congress by concurrent resolution or the President may designate.” (Italics added.)

The foregoing Act was amended by the Contract Settlement Act of July 1, 1944 (c. 358, §1 *et seq.*, 58 Stat. 649, 41 U.S.C.A. §101 *et seq.*) and the Surplus Property Act of October 3, 1944 (c. 479, §1 *et seq.*, 58 Stat. 781, 41 U.S.C.A. 201, formerly 50 U.S.C.A. App. 1611 *et seq.*),¹⁰ which eliminated the phrase “now indictable under any existing statutes”, added the clauses now numbered (2) and (3), and changed the suspension date from June 30, 1945, to three years after the termination of hostilities as proclaimed by

¹⁰The Revisor's Notes appended to the new Title 18 show clearly that the Suspension Act in its present form is derived from such prior legislation as the Surplus Property Act of 1944 and the Contract Settlement Act of 1944, and was intended to have only the limited effect which those acts had. Nothing in the Revisor's Notes indicates an intention to broaden the field within which the suspension was to operate.

“When the provisions of the War Contract Settlements Act of 1944, *upon which this section is based* * * *”

“Phrase (2) * * * [of this section] * * * *was derived from Section 28 of the Surplus Property Act of 1944* * * *” (Revisor's Note, 18 U.S.C.A. 3287.)

the President or by a concurrent resolution of Congress.

In all essential respects, however, Clause 1 of 18 U.S.C.A. 3287 is identical¹¹ with the 1921 proviso, *supra*, the 1926 proviso, *supra*, and the Act of August 24, 1942, *supra*.

Since Congress in enacting the Suspension Act employed the essential language of the 1921 and 1926 provisos, it is clear under well-settled rules of statutory construction that it adopted also the judicial construction given to such language and made it a part of the enactment. (*United States v. Ryan*, 284 U.S. 167 [1931]; *Apex Hosiery Co. v. Leader*, 310 U.S. 469 [1940]; *Shapiro v. United States*, 335 U.S. 1 [1948].) This view is confirmed by the legislative history of the Act of August 24, 1942. Both the House and Senate Reports¹² refer specifically to the 1921 proviso, the circumstances surrounding its enactment, and the necessity for a *similar* suspension of the normal statute of limitation during the second world war.

¹¹In the 1948 codification grammatical changes were made so that the words "defrauding or attempts to defraud" were replaced by the words "fraud and attempted fraud". The change was obviously not one of substance, but, as the Reviser's Notes indicate, merely a part of the formal changes in phraseology made throughout the revision. (18 U.S.C.A. 3287, Reviser's Note; 80 Cong., H. Rep. No. 304.)

¹²See Appendix.

- (2) **Necessity of the presence of intent to defraud as an element of the offense as a condition of the applicability of the Suspension Act.**

The judicial construction given to the 1921 and 1926 provisos and therefore properly to be given to the Suspension Act, is that the suspension of the statute of limitations is applicable only where the defrauding or attempting to defraud the United States is an essential ingredient of the offense. One essential ingredient in such defrauding is the *purpose or intent to defraud*.

In *United States v. Noveck, supra*, the defendant was indicted for perjury for having falsely understated his taxable income. The offense was committed more than three years prior to the return of the indictment. The Government contended that since the perjury was committed in the making of an income tax return and *was specifically alleged to have been committed for the purpose of defrauding the United States*,¹³ the offense was brought within the six-year period of limitations of the 1921 proviso. The Supreme Court affirmed the quashing of the indictment by the District Court on the ground that the prosecution was barred by the three-year statute of limitations and said:

“But the alleged purpose to defraud the United States is not an element of the crime * * * on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage * * *

¹³The form of the pleading did not deceive the Court as to the nature of the crime involved. It should not deceive this Court either. See *infra*.

The construction * * * contended for by the government divides perjury into two classes. It makes one include offenses having the elements specified [in the perjury statute] and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three year period * * * was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration¹⁴ but perjury, as defined * * * does not contain any such element." (*Ibid.*, 271 U.S. at 203-204.)

In *United States v. Scharton*, *supra*, the defendant was charged with wilfully attempting to evade and defeat taxes by falsely understating taxable income.

¹⁴This observation was subsequently modified by the Court in *United States v. McElvain*, *supra*, where the Court refused to apply the six-year limitation established by the 1921 proviso to an indictment charging a *conspiracy* to defraud the United States by filing a false income tax return, saying:

"The language of the proviso *cannot reasonably be read to include all conspiracies* defined by Section 37." (See *infra*.)

The District Court sustained his plea in bar that the offenses were committed more than three years prior to the return of the indictment and held inapplicable the six-year period of limitations fixed by the 1926 proviso, *supra*.

In the Supreme Court the Government contended that fraud is implicit in the concept of evading and defeating, and that attempts to obstruct or defeat the lawful functions of any department of the Government on the one hand, or to cheat it out of money to which it is entitled on the other, are attempts to defraud the United States if accompanied by deceit or other dishonest methods. The Government's position particularly was that any effort to defeat or evade a tax possesses every element of an attempt to defraud. The Supreme Court rejected this position and affirmed the judgment of the District Court, saying:

“We are required to ascertain the intent of Congress from the language used and to determine what cases the proviso intended to except from the general statute of limitations applicable to all offenses against the internal revenue laws.” (*Ibid.*, 285 U.S. at 521.)

The Supreme Court analyzed the applicable sections of the internal revenue law and concluded that under the section upon which the indictment was based it would be sufficient to plead and prove a wilful attempt to evade or defeat, and that an averment of intent to defraud the United States would be surplusage since the latter was not an essential element of the offense. Thereupon it said:

“As said in the *Noveck* case, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *United States v. McElvain*, 272 U.S. 633 * * * And, as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses.” (*Ibid.*, 285 U.S. at 521-522.)

From these decisions, it is clear that where a crime, such as perjury, or the wilful attempt to evade and defeat a tax by false statements, is a distinct offense complete in itself and does not involve as an essential ingredient of the crime, the purpose or intent to defraud the United States, the Suspension Act based on the 1921 and 1926 provisos and now embodied in the first clause of 18 U.S.C.A. 3287, does not apply. The Supreme Court has rejected the contention that fraud or the intent to defraud is implicit in such separate crimes. It has refused to allow the 1921 and 1926 provisos to be used to create new classes of crimes involving defrauding unless clearly so intended and it has refused to find such an intent in these provisos. It has disregarded the form of the provisos and held them to be excepting clauses to be liberally interpreted in favor of repose and not to be extended by construction to embrace frauds not so denominated by the statutes containing the offenses.

- (3) Necessity of the presence of pecuniary or property loss to the United States as an element of the offense as a condition of the applicability of the Suspension Act.

The terms "defrauding the United States" or "fraud against the United States" have at least two accepted meanings and the question to which we now direct ourselves is which of these two meanings is to be accorded to the phrase as used in the first clause of 18 U.S.C.A. 3287.

The usual and primary meaning is cheating the Government out of property or money. (*Hammerschmidt v. United States*, 265 U.S. 182 [1924]; *United States v. Cohn*, 270 U.S. 339 [1926].)

In statutes where it is apparent from the context or otherwise that more was intended, defrauding has been held to have a secondary and broader meaning of interfering with or obstructing lawful governmental functions by dishonest means. (*United States v. Keitel*, 211 U.S. 370 [1908]; *Haas v. Henkel*, 216 U.S. 462 [1910]; *Curley v. United States*, 130 F. 1 [1 Cir. 1904], cert. den. 195 U.S. 628 [1904].) For example, the Courts have uniformly held that the word "defraud" in the general conspiracy statute is to be given its secondary and broader meaning "which must result from the words 'in any manner or *for any purpose*' by which word 'defraud' is accompanied in the statute." (*United States v. Keitel, supra*, at 393.)

On the other hand, in statutes where neither the language nor the context warrants an extension of the term "defrauding" to a secondary and broader meaning, the Courts have held that the term is to be

construed in its primary sense of cheating the government out of property or money. Thus in *United States v. Cohn, supra*, the Court, in distinguishing "defrauding" as used in the False Claims statute (18 U.S.C.A. [old] 80) prior to its 1934 amendment, from its use in the general conspiracy statute, said:

"It is contended by the United States that by analogy to the decisions in *Haas v. Henkel*, 216 U.S. 462 * * * and *Hammerschmidt v. United States*, 265 U.S. 182 * * * and other cases involving the construction of Section 37 of the Penal Code relating to conspiracies to defraud the United States, the word 'defrauding' in the present statute should be construed as being used not merely in its primary sense of cheating the government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy 'to defraud the United States in any manner and for any purpose' with no words of limitation whatsoever, and no limitation that can be implied from the context. Section 35 [the False Claims Act] on the other hand has no words extending the meaning of the word 'defrauding' beyond its usual and primary sense. On the contrary, it is used in connection with the words 'cheating or swindling', indicating that it is to be construed in a manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss. And this meaning is emphasized by

other provisions of the section in which the word 'defraud' is used in reference to obtaining of money or other property from the government by false claims, vouchers, and the like; and by the context of the entire section, which deals with the wrongful obtaining of money and other property of the government, with no reference to the impairment or obstruction of its governmental functions." (*Ibid.*, 270 U.S. at 346-347.)

Applying these criteria to the term "fraud" in the Suspension Act, it is apparent that the term in this statute is limited to its primary sense of cheating the government out of property or money. There are no words extending the meaning of the term beyond this primary sense. It is true that the words "in any manner, whether by conspiracy or not" are used in connection with the term "fraud" but these relate to devices and methods of defrauding and not to its scope. The case would be different if, as in the general conspiracy statute, the words "or for any purpose" were also employed. To defraud the United States in any manner *or for any purpose* would encompass the broadest scope of fraud as the courts have indicated in the cases under the conspiracy statute. Had Congress intended in enacting Clause 1 of the Suspension Act to extend the meaning of defrauding beyond its usual and primary sense, it could easily have done so by broadening the language to read defrauding "in any manner, whether by conspiracy or not, *or for any purpose*", and this would have included interference by decep-

tive practices with lawful functions of the government. The failure to do so, particularly in view of the judicial construction placed upon the narrower language of the proviso, indicates a contrary intent.

Moreover, other sections and the entire text of the Contract Settlement Act and the Surplus Property Act, from which the Suspension Act derives, emphasize that “fraud” in the first clause thereof is limited to its primary meaning.

Thus the declaration of policy of the Contract Settlement Act states five objectives, all of which concern property or pecuniary matters with which the United States is directly concerned, and as its sixth and last objective, declares the purposes of the Act to be “to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.” (41 U.S.C.A. 101[a] to [f].) Other sections of the same Act relating to fraud uniformly use the word in its primary sense in reference to obtaining money or property from the government in connection with war contracts. (41 U.S.C.A. 107, 115[a], [b], 116[a], [b], 118[d], [e], 119.)

Section 19(b) of the Contract Settlement Act which is identical in pertinent part with the present Suspension Act—was one of the three interrelated sections which together made up an integrated scheme to detect and prosecute such frauds. Section 19(c)¹⁵ provided for civil remedies for those who

¹⁵Presently retained as 41 U.S.C.A. 119.

make false, fraudulent or fictitious claims or who engage in deceitful practices for the purposes of securing benefit, payment or other pecuniary values from the United States in connection with war contracts. Section 19(d) made applicable 18 U.S.C.A. 80 (now 18 U.S.C. 287 and 1001) with its criminal sanctions to any statement, representation, bill, receipt, and the like, made or caused to be made or used “for any purpose *under this chapter*”—that is, for any purpose having to do with war contracts involving property or pecuniary loss to the United States. Finally, Section 19(b) suspended the running of the statute of limitations in offenses involving defrauding or attempting to defraud the United States—that is, in its primary sense of causing the the United States pecuniary or property loss.

Similarly, the Surplus Property Act of 1944 states in its declaration of policy objectives which relate to pecuniary and property matters in which the United States is directly concerned. (41 U.S.C.A. 201 derived from 50 U.S.C.A. App. 1611). Other sections of that Act, relating to fraud, uniformly use the term in its primary sense as relating to obtaining money or property from the government in connection with surplus property transactions. (41 U.S.C.A. 239, formerly 50 U.S.C.A. App. 1635 [a] to [d].)

There is further internal evidence that the application of the Suspension Act must be limited to offenses involving pecuniary loss to the government. The last paragraph of 18 U.S.C.A. 3287 in which the Suspension Act is now found, reads:

“Definition of terms used in Section 103 of Title 41 shall apply to similar terms used in this section.”

Title 41 deals with and is entitled “Public Contracts”, and the key terms defined in Section 103 of that title are “prime contract”, “sub-contract”, “war contract”, “termination”, “material”, “government agency”, “contracting agency”, “termination claim”, “interim financing”, and “termination inventory”. These terms clearly speak of situations or transactions involving pecuniary dealings with the government and the reference to them in 18 U.S.C.A. 3287 must mean that the Suspension Act is operative only in situations involving such dealings.

The Revisers Note to 18 U.S.C.A. 3287 points out that this last paragraph of the Suspension Act “was added to obviate any possibility of doubt as to the meaning of terms defined in Section 103 of Title 41, U.S.C., 1940 ed., Public Contracts.”

The enactment of the Suspension Act in the context of the Contract Settlement and the Surplus Property Acts and a setting of payments, settlements, financing and disposal of property and other pecuniary values, confirms the conclusion that the “fraud” involved therein is fraud in its primary meaning.

If there remains any ambiguity as to the meaning of the word “fraud” in the Suspension Act, that ambiguity may be and is resolved by reference to its legislative history. (*United States v. American*

Trucking Association, 310 U.S. 534 [1940]; *Harrison v. Northern Trust Company*, 317 U.S. 476 [1943].)

In reporting out H.R. 6484, which became the Act of August 24, 1942, and was incorporated, as we have seen, without essential change in the Contract Settlement Act of 1944 and the Surplus Property Act of the same year, and thereby became the first clause of the present 18 U.S.C.A. 3287, both the House and the Senate Judiciary Committee left no doubt that the bill was aimed at suspending the running of the statute of limitations as to offenses involving defrauding or attempting to defraud the government in connection with war contracts let by government agencies for material and equipment and necessarily involved pecuniary or property loss, actual or attempted, to the United States.

The reports¹⁶ demonstrate that the necessity for such suspension arose out of the gigantic war program involving the expenditure by the government of huge sums of money in war contracts for material and equipment, the difficulty of discovering frauds in connection with these expenditures, and the necessary preoccupation of the law enforcement branch of the government with the enforcement of other laws, which prevented the investigation, discovery and prosecution of *this type of fraud* within the normal period of limitations. The legislative history of the Act of August 24, 1942 is searched in vain to find any intent to suspend the statute of limitations as

¹⁶See Appendix.

to offenses such as those charged in the indictment in the case at bar, which are entirely unrelated to war contracts and do not involve pecuniary or property loss to the government.¹⁷

Nothing in the legislative history or statutory context of the Contract Settlement Act of 1944, or the Surplus Property Act of that year, which made the formal amendments to the Suspension Act noted above, indicated any intention to alter the plain meaning of that Act as one relating to war contracts for material and equipment which necessarily involve pecuniary or property loss to the United States.¹⁸ On the contrary, the statutory context, as we have pointed out above, indicated an intention to reaffirm that meaning.¹⁹

¹⁷Representative Rankin of Montana had introduced a bill in 1941 calling for the wartime suspension of limitations on *all* federal offenses. Although she spoke in favor of such a broader coverage of the suspension statute when H.R. 6484 was before the House (88 Cong. Rec. 4759), her views were not followed and the Act with the more limited provisions here under consideration was adopted. (Norberg, *The Wartime Suspension of Limitations Act*, 3 Stanford Law Rev. [1951] 440, 451-452.) The remarks of Senator (now Mr. Justice) Burton, in presenting the bill to the Senate on behalf of the Judiciary Committee, also emphasized this limited scope of the suspension provided for. (88 Cong. Rec. 6160.)

¹⁸Similarly, nothing in the changes in phraseology which occurred when the Suspension Act became Section 3287 of the Revised Title 18 indicate any intention to modify its plain meaning.

¹⁹In *United States v. Bader*, 12 F. Supp. 922 (E.D. N.Y., 1935), the Court had occasion to examine the legislative history of the 1921 proviso, *supra*. The case involved a prosecution for aiding and abetting an unauthorized procurement of naturalization—substantially the offense charged in the third count of the indictment at bar. It was held that the statute of limitations of which the 1921 proviso was a part was not applicable to an offense under the Nationality Law. The Court, after examining the report of the House Committee on the Judiciary concerning the 1921 proviso (see Appendix) with its clear showing that Congress was seeking

B. THE CASES IN WHICH THE SUSPENSION ACT HAS BEEN HELD TO TOLL THE STATUTE OF LIMITATIONS ALL INVOLVE AN INTENT TO DEFRAUD THE UNITED STATES AND PECUNIARY LOSS TO THE UNITED STATES.

Only in cases where, under the statute defining the offense, intent to defraud was an essential ingredient of the crime and where there was an actual pecuniary loss to the United States, have the 1921 and 1926 provisos which were the predecessors of the Suspension Act been held to apply.

Thus, in *Bailey v. United States*, 13 F. (2d) 325 (9 Cir., 1926), in a prosecution for uttering and publishing a forged endorsement of a draft on the United States Treasury with intent to defraud the United States, the six-year period of limitations of the 1921 proviso was held applicable because, said the Court, "The defrauding of the United States is a statutory ingredient of the crime charged in the second count of the indictment, at least * * *"²⁰

Similarly, in *Weinhandler v. United States*, 20 F. (2d) 359 (2 Cir., 1927), cert. den. 275 U.S. 554 (1927), in a prosecution for the embezzlement of federal funds the six-year period of limitations of the 1921 proviso was held applicable because:

to reach wartime frauds which involved pecuniary or property loss to the Government, said that the conclusion was "irresistible" that such a proviso was not intended to supersede the provisions of the Nationality Code and its (then) five-year statute of limitations. That statute, of course, has been reduced to three years, and is now contained in 18 U.S.C. 3282.

²⁰Actually, the language of the Court was dicta, since the conviction was reversed on other grounds. (*Bailey v. United States*, *supra*, at 327.)

“The Supreme Court said in *Grin v. Shine*, 187 U.S. 189 * * * that ‘as the word “embezzled” itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word “fraudulent” would not enlarge or restrict its signification. Indeed, it is impossible to embezzle the money of another without committing fraud upon him.’ Uttering and publishing a forged endorsement of a draft of the United States Treasury with intent to defraud the United States, is within the proviso. *Bailey v. United States* * * * In view of these authorities we hold that fraud is an element of the crime of embezzlement.” (*Weinhandler v. United States, supra*, at 361.)

The foregoing cases involved a direct and pecuniary loss to the government and the “defrauding” of the United States involved was a necessary ingredient of the offense charged.

Similarly, in *Falter v. United States*, 23 F. (2d) 420 (2 Cir., 1928), cert. den. 277 U.S. 590 (1928), defendants, government employees and others, were indicted for a conspiracy to defraud the United States by false statements to a government agency that contracts for goods had not been filled and that, therefore, the buyer was entitled in substitution to new disposable goods as they came in at prices fixed by the original contract, which prices were lower than the prices current at the time the substitute goods were delivered, thus depriving the government of the difference between the contract and the current price. The Court held the 1921 proviso applicable.

“The fraud was neither an intent nor the purpose of the crime as in *United States v. Noveck * * **, nor an offense against the revenue laws as in *United States v. McElvain * * ** The conspiracy to defraud was the crime and the crime consisted only in the fraudulent conspiracy.” (*Falter v. United States, supra*, at 426.)

But it must be noted that the very heart of this fraudulent conspiracy was the pecuniary loss to the government, e.g., the difference between the contract price and the current price of the substituted goods.

To like effect see:

Evans v. United States, 11 F. (2d) 37 (4 Cir., 1926) (a false claim for refund of a portion of excise taxes), where the Court, holding the 1921 proviso applicable, said:

“The evil which the statute was intended to reach was the obtaining of money from the United States by false pretenses.” (*Evans v. United States, supra* at 38.)

Miller v. United States, 24 F. (2d) 353 (2 Cir., 1928), cert. den. 276 U.S. 638 (1928) (a conspiracy to defraud the United States by allowing illegal claims without proper investigation for a pecuniary reward), where the Court held the 1921 proviso applicable, saying:

“The overt acts charged in furtherance of the conspiracy, and essential to the statutory crime of conspiracy, showed a consummated fraud as against the Government and the property rights of the United States * * * The conspiracy was

one, not merely to secure the allowance of claims, but to defraud the United States by procuring the payment of money and to transfer the bonds to the Swiss Corporation 'whereby the United States was to be and was defrauded of its possession and dominion of a large fund under its administration.' '' (*Miller v. United States, supra*, at 360-361.)

It is significant to note that in all of these cases the element of pecuniary or property loss to the United States was a necessary prerequisite to the application of the six-year period of limitations. Where such loss was not involved as an essential ingredient of the crime the three-year statute of limitations has been held to be a bar to the prosecution. (*United States v. Noveck, supra*; *United States v. Scharton, supra*; *United States v. McElvain, supra*; *Marzani v. United States, supra*; *United States v. Obermeier, supra*.)

No case has been found in which the statute of limitations was extended under the 1921 or 1926 provisos or was suspended under the Suspension Act (except possibly *United States v. Gottfried*, 165 F. (2d) 360 [2 Cir., 1948], cert. den. 333 U.S. 860 [1948], which is discussed in detail below), unless "defrauding" in the statute defining the offense was limited to its primary sense and necessarily involved pecuniary loss to the United States.

In the light of the language of the Suspension Act, of its context with the other sections in the setting of the Contract Settlement and Surplus Property Acts,

of the legislative history of the first clause of the Suspension Act, of the requirements of pecuniary or property loss to the United States in decisions under the analogous 1921 and 1926 provisos, and of the decisions in *Marzani v. United States* and *United States v. Obermeier, supra*, which we discuss in detail below, we submit that the Suspension Act employs "fraud against the United States" in its primary sense of cheating the government out of property or money and is therefore applicable to suspend the statute of limitations only where such fraud in this primary sense is an essential ingredient under the statute defining the offense.

C. THE ELEMENTS OF INTENT TO DEFRAUD THE UNITED STATES AND PECUNIARY OR PROPERTY LOSS TO THE UNITED STATES ARE NOT ESSENTIAL ELEMENTS OF THE CRIMES CHARGED IN THE INDICTMENT AT BAR.

(1) Count 1 of the Indictment.

The first count of the indictment is based upon 18 U.S.C. 371 which punishes in the alternative²¹ a conspiracy "to commit any offense against the United States" or a conspiracy "to defraud the United States". The indictment in this case is based upon the second alternative, e.g., the appellant is charged with having conspired to defraud the United States.

(a) Intent to defraud the United States.

It is not at all clear that intent to defraud is an essential element of this crime. (*United States v.*

²¹Norberg, *The Wartime Suspension of Limitation Act*, 3 Stanford Law Rev. 440, 445.

Stone, 135 F. 392 [D.N.J., 1905]; *Lisansky v. United States*, 31 F. (2d) 846 [4 Cir., 1929], cert. den. 279 U.S. 873 [1929]; *Holmes v. United States*, 134 F. (2d) [8 Cir., 1943], cert. den. 319 U.S. 776 [1943]; *Cannella v. United States*, 157 F. (2d) 470 [9 Cir., 1946].) However, since both intent to defraud the United States and the presence of pecuniary or property loss to the United States are essential elements of any offense to which it is sought to apply the Suspension Act, we pass this point by and consider whether or not there is present the element of pecuniary or property loss to the United States.

(b) Pecuniary or property loss to the United States.

It is self-evident and will be conceded by the government, we believe, that pecuniary or property loss to the United States is not an element of the crime charged in Count 1 of the indictment. In addition to the cases heretofore cited,²² other cases clearly establish that pecuniary or property loss to the government is not an essential element of the offense charged under the general conspiracy statute. (*Outlaw v. United States*, 81 F. (2d) 805 [5 Cir., 1936], cert. den. 298 U.S. 665 [1936]; *United States v. Harding*, 81 F. (2d) 563 [App. D.C., 1936]; *Braatelian v. United States*, 147 F. (2d) 888 [8 Cir., 1945]; *Heald v. United States*, 175 F. (2d) 878 [10 Cir., 1949], cert. den. 338 U.S. 859 [1949].)

²²*United States v. Keitel*, *supra*; *Haas v. Henkel*, *supra*; *Curley v. United States*, *supra*.

As a matter of fact, the trial Court so held in this very proceeding (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

(2) Counts 2 and 3 of the Indictment.

(a) Intent to defraud the United States.

Counts 2 and 3 of the indictment are based upon 8 U.S.C.A. 746(a)(1) and 8 U.S.C.A. 746(a)(5) respectively. These statutes make it a crime knowingly to make a false statement under oath in a naturalization proceeding (Count 2) and to aid a person not authorized thereto to procure naturalization (Count 3).

It is perfectly clear that in neither case is specific intent to defraud the government an essential element of the offense and the few litigated cases on the point have so held, declaring that the falsehood itself or the aiding itself constitute the crime irrespective of the element of the specific intent to defraud. (*Holmgren v. United States*, 156 F. 439 [9 Cir., 1907], aff. 217 U.S. 509 [1910]; *Roberto v. United States*, 60 F. (2d) 774 [7 Cir., 1932]; *United States v. Fotie*, 137 F. (2d) 831 [8 Cir., 1943].)

(b) Pecuniary or property loss to the United States.

Here, too, it is self-evident that pecuniary or property loss to the United States is not and cannot be an element of the offenses created by the statutes upon which the second and third counts of the indictment are based. There is no reference to property loss to the government in either the statutes involved

or the indictment itself, nor of course was there any in the proof offered at the trial. Again, the trial court held as much in this very case. (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

Since the Suspension Act is applicable only when both intent to defraud the United States and pecuniary or property loss to the United States are present in the offenses involved, and since the offenses involved in this case do not embrace these elements, the Suspension Act is not applicable to this proceeding.

D. THE COURT BELOW ERRONEOUSLY CONCLUDED THAT THE SUSPENSION ACT WAS APPLICABLE TO THIS PROSECUTION.

Despite the foregoing, the Court below adopted the government's contention that the Suspension Act tolled the operation of the statute of limitations with respect not only to the first count but also to the second and third counts "on the general theory that fraud is implicit in each count". (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

The difficulty with the Court's position is that it failed properly to analyze the statute before it—a statute suspending, *in certain limited cases*, the operation of a general statute of limitations. It attempted to dispose of the problem of limitations solely upon the basis of its conclusions concerning the substantive elements of the offenses.

- (1) The trial Court erroneously applied *United States v. Gilliland* to the case at bar.

The trial Court, placing heavy reliance²³ upon *United States v. Gilliland*, 312 U.S. 86 (1941), concluded that pecuniary loss to the government is not an element of the substantive offenses here charged against appellants. The trial Court thought erroneously that this was dispositive of the question before it. For from that conclusion the trial Court proceeded to another conclusion—that the absence of pecuniary loss to the government has no effect upon the applicability of the Wartime Suspension of Limitations Act to the case. That is where the trial Court made its fatal error.

The trial Court confused a consideration of the substantive elements of the crime with a consideration of the criteria which determine the applicability of a given statute of limitations. It failed to recognize that while an indictment might state facts sufficient to constitute an offense against the United States (even in the absence of allegations of pecuniary loss to the government), the prosecution still might have been commenced at a date subsequent to the expiration of the applicable period of limitations. The validity of the indictment as a matter of pleading does not determine the timeliness of the prosecution.

For this very reason the trial Court's reliance upon *United States v. Gilliland*, *supra*, was clearly misplaced since no question of limitations was there

²³See *United States v. Bridges*, 86 F. Supp. 922, 927 (N.D. Calif., 1949).

involved. That case involved a demurrer to an indictment charging a violation of the False Claims Act.²⁴ The demurrer was based upon the ground that the indictment did not state facts sufficient to constitute an offense since there was no pecuniary loss to the government alleged. The Supreme Court held that since pecuniary loss to the government was not an element of the offense under the False Claims Act, the demurrer had been improperly sustained.²⁵ When Chief Justice Hughes used the language quoted by the trial Court, he was discussing *the substantive elements of the crime* created by the False Claims Act. He found, primarily because of its legislative history, that the language of the False Claims Act was sufficiently broad to embrace fraudulent representations made to any agency of the government without restriction to cases involving financial loss to the government. As a matter of fact, he recognized that it was the purpose of the legislation to protect the government from deceptive practices whether or not there was pecuniary loss.²⁶ Chief Justice Hughes was not concerned with the question of the outlawing of the prosecution by the operation of the statute

²⁴For the pertinent provisions of that Act, see *infra*.

²⁵Parenthetically it is interesting to observe that involved in the *Gilliland* case were false statements with respect to petroleum production which clearly involved fraud having pecuniary roots.

²⁶This effort of the Chief Justice to apply the statute in such a way as to carry out its manifest purpose is consistent with what we have said above concerning the duty of the Court to carry out the manifest purpose—but not to go beyond the manifest purpose—of the Wartime Suspension Act, and with what we shall say below concerning the duty of a court to carry out the manifest purpose of the recodification of Title 18 and the reduction of the statute of limitations (18 U.S.C.A. 3287) to three years.

of limitations since that question did not exist in the case.²⁷

It is clear from a reading of the opinions of the District Court and the Supreme Court²⁸ that the only question involved was the applicability to a certain set of facts of a statute *creating a substantive offense*, and the only thing the case held was that the facts alleged in the indictment were sufficient *to state an offense* against the United States under the statute even though it was not alleged that there was a pecuniary loss to the government. There was no plea that the prosecution was barred by the statute of limitations.

It is elementary, of course, that there is a vast distinction between these two questions: (a) does a pleading state a cause of action—or in the case we are considering, does an indictment state facts sufficient to constitute an offense; and (b) has the action—

²⁷The Supreme Court described the District Court's holding as follows:

“The district court held that these *substantive* counts *did not state an offense* under Section 35 of the Criminal Code * * *” (*United States v. Gilliland, supra*, at 89.)

The District Court described the demurrer upon which it had ruled as follows:

“Defendants have filed a lengthy demurrer, attacking the indictment on numerous grounds, which may be summarized under the following headings: (1) that the facts alleged in all counts *do not charge offenses* against the United States; (2) all counts are too vague and indefinite to enable the defendants to plead thereto; and (3) in any event, the facts alleged in counts 2 to 11 inclusive are insufficient to bring them within the purview of section 80 of Tit. 18 U.S.C. * * *” (*United States v. Gilliland*, 35 F. Supp. 181, 182 [E.D. Texas, 1940].)

²⁸The case went to the Supreme Court on direct appeal since it involved the District Court's construction of a statute. (18 U.S.C.A. [old] 682 [now 18 U.S.C.A. 3731].)

in this case a criminal prosecution—been commenced within the period permitted by the applicable statute of limitations. Clearly it is possible to answer the first question in the affirmative and the second in the negative. All that the *Gilliland* case did, or could have done, was to answer the first question in the affirmative. It did not and could not have dealt with the second question.

The second question, of course, is the precise question which is involved in this case and upon its resolution the government's position on the applicability of the Wartime Suspension Act must stand or fall.

The cases which dealt exclusively with the second question, *United States v. Noveck*, 271 U.S. 201 (1926); *United States v. McElvain*, 272 U.S. 663 (1926); *United States v. Scharton*, 285 U.S. 518 (1932); and *Marzani v. United States*, 168 F. (2d) 133 (App. D.C., 1948), affirmed by a divided Court in 335 U.S. 895, were barely considered by the trial Court, and to the extent that they were, were put to one side by reliance upon *United States v. Gottfried*, 165 F. (2d) 360 (2 Cir., 1948), cert. den. 333 U.S. 860 (1948). *United States v. Obermeier*, 186 F. (2d) 243 (2 Cir., 1950), cert. den. U.S., 71 S. Ct. 573, 95 L. ed. 452 (1951), which also dealt exclusively with the statute of limitations question, had not been decided when the trial Court ruled. It is to this series of cases we shall now direct our attention.

- (2) The trial Court erroneously failed to apply *Marzani v. United States* to the case at bar.

In *Marzani v. United States, supra*, the defendant was indicted under the False Claims Act (18 U.S.C.A. [old] 80) which made it a crime "knowingly and wilfully * * * [to] make * * * any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States." The offense charged was that when Marzani was interrogated by representatives of the Civil Service Commission and the Federal Bureau of Investigation concerning his eligibility for federal employment, he falsely denied membership in the Communist Party.

The indictment in Marzani's case was returned more than three years after the commission of the offenses alleged in nine counts of an eleven-count indictment. His motion to dismiss those nine counts upon the ground that a prosecution thereunder was barred by the statute of limitations was denied by the trial Court which sustained the government's contention that the Suspension Act tolled the operation of the statute of limitations.

The Court of Appeals for the District of Columbia unanimously held:

"* * * The first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted." (*Ibid.*, 168 F. (2d), at 137.)

The Court, after reciting the facts outlined above, correctly stated that the question before it was whether the Suspension Act applied to offenses under the False Claims Act.²⁹ This is the analogue of the issue in the case at bar: does a statute of limitations bar the prosecution; not, does the indictment state facts sufficient to constitute an offense against the United States.

The court in the *Marzani* case did not concern itself with the question of whether because of the absence of pecuniary loss to the government the indictment did not state an offense under the False Claims Act. That question had been removed from its considera-

²⁹For the sake of ready comparison we quote the significant language of the False Claims Act and the language of the statutes under which the indictment in this case was drawn:

FALSE CLAIMS ACT

“* * * Whoever shall knowingly and wilfully * * * make * * * any *false* or *fraudulent* statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined,” etc.

COUNT 1

18 U.S.C. 371

“If two or more persons conspire * * * to *defraud* the United States or any agency thereof in any manner or for any purpose * * * each shall be fined”, etc.

COUNT 2

18 U.S.C. 1015

“Whoever knowingly makes any *false* statement under oath in any case * * * relating to naturalization * * * shall be fined”, etc.

COUNT 3

8 U.S.C.A. 746(a) (5)

“It is hereby made a felony for any * * * person * * * to encourage * * * any person not entitled thereto to obtain * * * any * * * certificate of naturalization * * * knowing the same to have been procured by *fraud*.”

tion by *United States v. Gilliland, supra*. The only question before it was, irrespective of whether the indictment stated facts sufficient to constitute an offense against the United States, did the statute of limitations bar the prosecution. That is the precise question we are here considering.

Having correctly recognized the issue before it, the Court of Appeals said, and we quote the following at length because it is completely dispositive of the government's contentions and of the trial Court's opinion in this respect:

"We see no escape from the conclusion impelled by two decisions of the Supreme Court, *United States v. Noveck* [1926, 271 U.S. 201, 46 S. Ct. 476, 70 L. Ed. 904]³⁰ (and its companion cases, *United States v. McElvain* [1926, 272 U.S. 633, 47 S. Ct. 219, 71 L. Ed. 451] and *United States v. Scharton* [1932, 285 U.S. 518, 52 S. Ct. 416, 76 L. Ed. 917]) and *United States v. Gilliland* [1941, 312 U.S. 86, 61 S. Ct. 518, 85 L. Ed. 598].

"In *United States v. Noveck*, the question was whether a statute which read, 'That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, * * * the period of limitation shall be six years', [42 Stat. 220 (1921), 18 U.S.C.A. § 582] applied to perjury in an income tax return. The indictment alleged that the perjury was for the 'purpose of defrauding the United States.' The Supreme Court held that the six-year statute did not apply,

³⁰Bracketed citations and matter, here and throughout this quotation, are the Court's footnotes.

because defrauding the United States is not an element of the crime of perjury. The language of that statute of limitation is the same as that of the Suspension statute here involved; in fact, that statute was the predecessor to this one.

“In *United States v. McElvain*, *supra*, the Court held that the six-year statute of limitations involved in *United States v. Noveck* did not apply to a conspiracy to defraud the United States by making a false income tax return. In *United States v. Scharton*, *supra*, the indictment was for an attempt to evade taxes by falsely understating taxable income. The defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the Government, if accompanied by dishonest methods, are attempts to defraud the United States. The Court held that the six-year limitation applicable to offenses involving the defrauding of the United States, was not applicable to the offense described in that indictment. [Other cases referred to in the briefs in this connection are *Bailey v. United States*, 9 Cir., 1926, 13 F. 2d 325; *Weinhandler v. United States*, 2 Cir., 1927, 20 F. 2d 359, certiorari denied 1927, 275 U.S. 554, 48 S. Ct. 116, 72 L. Ed. 423; and *Falter v. United States*, 2 Cir., 1928, 23 F.2d 420, certiorari denied 1928, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003. In the *Bailey* case, the court held that defrauding the United States was a statutory ingredient of the offense of uttering and publishing a forged indorsement to a Government check with intent to defraud the United States. In the *Weinhandler* case, the court held that the fraud is an element of the crime of

embezzlement, and that, therefore, the six-year limitation in the 1921 proviso applied. In the *Falter* case, the court held that a conspiracy to commit a civil fraud is a crime under the conspiracy statute.]

* * * * *

“It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute.³¹ If perjury on an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding the United States within the meaning of a statute of limitations, we do not see how making a false statement in the course of an inquiry into one’s qualifications for federal employment can be.³²

“The contention of the Government is that the *Gilliland* case, *supra*, merely held that an inten-

³¹“Such [e.g., ‘in a pecuniary way’] defrauding of the United States” is clearly not an essential ingredient of the offenses described by the indictment here in question or under the statutes here in question. (See *supra*.) The trial Court so held—and mistakenly thought that the holding disposed of appellant’s argument on the statute of limitations. As a matter of fact this holding makes absolutely imperative the conclusion that the Suspension Act is *not* applicable here and clearly distinguishes this case from *United States v. Gottfried*, 165 F.2d 360 (2 Cir., 1948), cert. den. 333 U.S. 860 (1948).

³²Nor do we see how making a false statement in the course of an inquiry into one’s qualifications for citizenship can be either.

tion to swindle or defraud the Government, resulting in property or pecuniary loss, is not an element of proof under the False Claims Act; and that that Act retained, after its amendment, 'all its essential fraud characteristics', that 'the conception of fraud against the United States formerly expressed in the statute' was retained by the 1934 amendment. It says that a false statement made in a matter within the jurisdiction of an agency of the United States '*necessarily* [italics in Government's brief] involves a fraud.' The gist of the Government's contention is stated thus: 'However, where an offense violative of the second clause involves "knowingly and wilfully" making "false and fraudulent statements," the statute (recognizing the intrinsically wilful and fraudulent element in the very nature of the acts proscribed) does not require the government to establish proof of (a) intent to defraud, or (b) pecuniary or property loss to the United States. Hence, the essential fraud elements continue as a constant in Section 80, although the accidental language has changed insofar as "intent of cheating and swindling or defrauding" found in the Act of October 23, 1918, may have varied the form rather than the substance of the offense.'

"The difficulty with the foregoing contention is that it ignores the plain rulings in *Noveck* and kindred cases. Those cases involved false statements, under oath. The offense tended to obstruct, by dishonest means, the operation of a department of the Government. The court held that the Suspension Act (actually an identical predecessor) does not apply to such offenses. *So that*

even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the Noveck and similar cases related to precisely that same sort of fraud. Despite the vigor and skill with which the Government's contention is pressed upon us by its counsel, we can see no escape from the conclusion. It follows that we are of opinion that the first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted." (*Ibid.*, at 136-137.)

The legislative history of the Wartime Suspension statute (see *supra*) makes it clear that the Court of Appeals for the District of Columbia correctly interpreted the congressional intent in holding that that statute of limitations was suspended only in cases where the intent to defraud was present and involved a pecuniary loss to the Government.

This legislative history make it clear that congressional concern was over the fact that in the necessity of executing wartime contracts and of obtaining as quickly as possible war supplies and materials, the Government would not have the opportunity carefully to scrutinize contracts and that the contractors would or could take advantage of the Government's preoccupation with the war effort to practice frauds upon it. Under those circumstances, and for that limited purpose, *and for no other purpose*, Congress suspended the operation of the statute of limitations insofar as wartime frauds were concerned. It is clear that Congress never intended to suspend the operation

of the statute of limitations for all crimes in general or even for all frauds in general. Therefore, even conceding for the sake of argument that the crimes described in the indictment here are "frauds", it is clear that the statute of limitations as to them has not been suspended.

Finally, the Court of Appeals for the District of Columbia correctly recognized that a suspension statute, being in derogation of a general statute of limitations, must be strictly construed and should not be given any scope or effect broader than that which is necessary to achieve its limited purpose. See *infra*.

In *United States v. McElvain*, 272 U.S. 633 (1926), cited by the Court of Appeals in the *Marzani* case, the Supreme Court was considering the problem in relation to an indictment which charged *conspiracy to defraud* the United States in respect of its internal revenue laws by the filing of false income tax returns. This case is even more significant than *United States v. Noveck*, *supra*, or *United States v. Scharton*, *supra*, since it involved a *conspiracy to defraud* which is precisely what is alleged in the first count of the indictment herein. The Court nonetheless reached the same conclusion that it had in the *Noveck* case, saying:

"The proper application of the proviso is to be found upon a consideration of its scope as compared with that of the original section having regard to the statutes of limitation. Section 1044 is comprehensive in language and purpose; it relates to all crimes, excepting only capital offenses and those arising under the revenue and slave trade laws. The purpose of the added proviso was

to carve out a special class of cases. It is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose. *United States v. Dickson*, 15 Pet. 141, 165; *Ryan v. Carter*, 93 U.S. 78, 83.

“The proviso relates to substantive offenses involving defrauding or attempts to defraud the United States, whether committed by one or more or by conspiracy or otherwise. It does not extend to any offenses not covered by Section 1044. The crime of conspiracy to commit an offense is distinct from the offense itself. *The language of the proviso cannot reasonably be read to include all conspiracies defined by Section 37.*³³ But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offense which it covers.”³⁴ (*Ibid.*, 272 U.S. at 639.)

Similarly the Suspension Act (of which the proviso referred to by the Court was the predecessor) must be construed strictly and be held to apply only to cases shown to be clearly within its purpose—which is not the case at bar; and it cannot be read (as the trial Court read it) to include all conspiracies, even all conspiracies to defraud. Clearly something more

³³The section referred to was the general conspiracy statute (later 18 U.S.C.A. [old] 88) which is identical in all material respects with 18 U.S.C. 371 upon which the first—or the conspiracy—count of this indictment is based. Specifically it embraced conspiracies “to defraud the United States in any manner or for any purpose”.

³⁴That is, conspiracies to commit crimes of which fraud in its primary sense is an essential ingredient and which involve therefore pecuniary loss to the Government. (*Supra*, pp. 80-87.) The substantive offenses at bar are not such crimes. (*Supra*, pp. 92-95.)

is required to be shown before the normal statute of limitations may be suspended. That, as we have shown, is the presence of an intent to defraud the United States in a situation involving a pecuniary or property loss to the Government.

As its opinion in the *Marzani* case shows, the pertinent Supreme Court decisions were carefully considered by the Court of Appeals for the District of Columbia. That Court, of course, had no alternative but to follow the logic and reasoning of the Supreme Court on the point. This it did in a carefully considered and well-reasoned opinion which not only analyzed the Supreme Court decisions in great detail but which gave careful attention to the Government's contentions, going so far as to quote pertinent portions of the Government's brief in its opinion, and stating the reasons why it was unable to follow those contentions. Those contentions, of course, are identical with the ones here made by the Government, and in this case, followed by the District Court. We submit that the logic of the Court of Appeals, based squarely on the Supreme Court decisions, which required the rejection of the Government's contention in the *Marzani* case similarly requires its rejection here.

Since the decision of the trial Court, the Court of Appeals for the Second Circuit has decided a case which, if possible, is even more akin to the case at bar than is the *Marzani* case. In *United States v. Obermeier*, 186 F.2d 243 (2 Cir., 1950), cert. den. U.S., 71 S.Ct. 573, 95 L. ed. 452 (1951), the de-

fendant was charged with a violation of 8 U.S.C.A. 746(a)(1) in that he made a false statement concerning his alleged membership in the Communist Party in his petition for naturalization. The nature of the charge, as well as the section upon which it is based, is exactly identical with the situation presented by the second count of the indictment at bar, and is of course in all material respects identical with the situation presented by the first and third counts of the indictment in the case at bar.

In the *Obermeier* case the indictment as to two of its three counts was returned more than three but less than five years after the commission of the alleged crime. This is exactly identical with the situation at bar as to all counts. In reversing the conviction on the two counts which were thus barred by the statute of limitations, the Court of Appeals for the Second Circuit considered the Government's contention that the Wartime Suspension Act preserved its right to prosecute the action and disposed of this contention very briefly in the following language:

“The government contends, however, that, in any event the War Time Suspension of Limitations Act preserved its right to prosecute this action. That Act, so far as pertinent, is substantially the same as the Acts interpreted by the Supreme Court in *United States v. Noveck* * * * *United States v. McElvain* * * * and *United States v. Scharton* * * *. As so interpreted, it suspends a statute of limitations only when fraud or attempted fraud against the United States (or one of its agencies) ‘is an ingredient under the

statute defining the offense,' and does not, absent such a statutory definition, apply to perjury or false swearing, even when the United States is directly interested. * * * Nothing in 8 U.S.C.A. §746(a)(1), under which defendant was indicted, makes fraud an ingredient of the crime.

"Accordingly, we reverse as to the first two counts, * * *" (186 F.2d at 256-257.)

- (3) The trial Court erred in its reliance upon *United States v. Gottfried*, since that case is not apposite to the situation at bar.

The case urged by the Government and cited by the trial Court, *United States v. Gottfried*, 165 F.2d 360 (2 Cir., 1948), cert. den. 333 U.S. 860 (1948), is not controlling for at least four reasons, three of which were apparent when the trial Court made its ruling here. In the first place, it dealt with a different statutory offense from the ones here involved. In the second place, on its facts it is clearly distinguishable from the case at bar. If there ever was a justification for giving the Suspension Act any elasticity at all, then the facts of the *Gottfried* case presented such a situation. In the third place, the learned judge who wrote the opinion was demonstrably in error with regard to the history of the statutes that he was considering. Finally, the *Gottfried* case has been distinguished, if not actually cast aside, by *United States v. Obermeier, supra*.

- (a) The offense involved in the *Gottfried* case was different from those here involved.

Gottfried and others were charged with a violation of 18 U.S.C.A. (old) 80 and 88: with the making of

a fraudulent statement "in a matter affecting the administration of the Office of Price Administration" and with a conspiracy to defraud the United States "by depriving it of the services of Stanton, an investigator in the Office of Price Administration". The offenses here involved were no part of the *Gottfried* case. Under these circumstances, "the value of the (*Gottfried*) opinion as a precedent in the *Bridges* case is open to question."³⁵

(b) The *Gottfried* case cannot be controlling because its facts are so different from those at bar.

More important, with respect to its facts, the *Gottfried* case is almost a direct antithesis to the case at bar, just as the *Marzani* and *Obermeier* cases are almost its perfect parallel. In the *Gottfried* case the offense, as described in the Court's own language, was as follows:

"Gottfried's company made and sold Pepsi-Cola, Hire's root-beer and other 'soft drinks' at Ellen-ville, New York; and in order to do so it bought and used large quantities of sugar. Under the regulations existing at the time—1942—the amount allowed to the company in each year depended upon the amount which it had used in 1941, and which it was obliged to enter upon an official form provided for the purpose. Although Gottfried did not actually fill out the form in this instance, he signed it, and he was aware at the time that it exactly doubled the quantity of sugar which the company had used in 1941. The statement was filed on April 29, 1942, with the Office

³⁵Norberg, *The Wartime Suspension of Limitations Act*, 3 Stanford Law Rev. 440, 445 (1951).

of Price Administration, which about a year later—in March, 1943—received an anonymous letter declaring that it was false. The Office thereupon detailed the defendant, Stanton, to check it by examining the company's records; Stanton went to its office on March 19th and saw Long, its president, who told him to come back in a few days. Long thereupon called up Gottfried in New York, and later at an interview Gottfried told him 'that his sugar base was inflated,' and 'that he was into it up to his neck.' Gottfried thereupon by telephone set about 'trying to find some one who could help him' and was finally recommended to the defendant, Forman, a lawyer, who lived in Kingston. Later, Gottfried told Long to visit Forman, and at their interview Forman said that the matter could be arranged, but that it would cost \$1500. On Sunday, the 28th, the three met at the Hotel Pierre in New York in an interview at which it was finally agreed that Forman should have \$1500, as he demanded; and the next day Gottfried gave Long the cheque of his wife for that sum, which Long cashed at Ellenville, and paid Forman \$1450 out of the proceeds. (What happened to the other \$50 is not altogether clear, but later Forman received a company cheque for that amount.) At some date which was in sharp dispute Stanton appeared at Ellenville, and with Long made a pretended examination of the records. He accepted figures read off to him by Long without personally examining the records, and put them down on an adding machine. They equalled the amount in the statement which, as we have already said, exactly doubled the amount bought in 1941. This came about because Long at Gottfried's direction pro-

cured duplicate invoices of all the sugar which the company had bought during that year, and read both the originals and the duplicates. Stanton reported to his superiors in the Office of Price Administration in Albany that the statement was correct, and for this Forman paid him \$200." (Ibid., 165 F.2d at 362-363.)

These facts show how the Government was defrauded by cheating it in connection with the distribution of a vital wartime staple and by the bribery and corruption of one of its agents. If there ever was a case that in the absence of direct pecuniary loss to the Government might be regarded as coming within the legislative purpose of the Wartime Suspension Act, this clearly is such a case. What was involved in the *Gottfried* case was the operation of a wartime agency set up for the purpose of controlling the distribution of a commodity essential to the successful prosecution of the war. The defendant defrauded that agency and lined his own pockets with his gain. It is true that the money which he procured in this illegitimate fashion did not come directly from the treasury of the United States—it came merely from the people of the United States in their capacity as consumers. Furthermore, when his crime was about to be uncovered he procured the bribery of a Government agent. Conduct of this sort could be detrimental to, if not destructive of, the war effort. Clearly it was the kind of conduct which might not be detected during a period of war and therefore is the kind of conduct which a Court could legitimately conclude Congress

intended to hold open for subsequent investigation and prosecution even after the normal three-year period had run.³⁶

Bridges' case, like *Marzani's* and *Obermeier's*, had no relationship to the war effort. *Bridges'* case was a simple naturalization. The fact that it occurred during the war rather than before or after the war was a pure accident. The situation did not arise out of the war, as did *Gottfried's*. In *Gottfried's* case, there would not have been an offense, nor could there have been a situation in which the offense could have arisen, but for the existence of the war. The whole price control and rationing program was part of the war effort.

The vast factual differences between the two situations must compel a close scrutiny before the conclusion of *Gottfried's* case is applied to *Bridges'*. Particularly must this be so when there are the well-reasoned and authoritative precedents of *Marzani's* and *Obermeier's* cases in *Bridges'* favor on this point—precedents based upon facts which are indistinguishable from the facts of *Bridges'* case.

(c) The court in the *Gottfried* case clearly committed at least two demonstrable errors.

First, it apparently failed to recognize that different criteria apply to a consideration of the substan-

³⁶ "Besides, the purpose of the Amendment [the Suspension Act] was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar." (*Ibid.*, 165 F.2d at 368.)

tive elements of an offense and to a consideration of the applicability of a statute of limitations,³⁷ for it decided the statute of limitations question on the basis of its understanding of the law with respect to the meaning of the word “fraud” in the substantive criminal statute:

“* * * it has been the law, at least since 1910, that in the statute [§ 80, Title 18 U.S.C.A.]³⁸ under which this indictment was drawn, ‘fraud’ includes any conduct, ‘calculated to obstruct or impair its [the United States’] efficiency and destroy the value of its operations and reports.’ [Haas v. Henkel, 216 U.S. 462, 479.] *We see no reason for reading the words ‘defrauding the United States’ in the statute of limitations now in question less comprehensively * * **” (*Ibid.*, 165 F.2d at 368.)

The reasons why the Court should have read the words “defrauding the United States” in the Suspension Act less comprehensively than it would have read those words in the other statute are discussed *supra* at pages 96-99. Irrespective of the meaning of the words in the other statute, the words in the Suspension Act clearly were intended to apply only where intent to defraud was an essential ingredient of the crime and where there was involved a pecuniary or property loss to the United States. The Court’s equation of the meaning of the words in two separate statutes undoubtedly resulted from the fact that its cursory

³⁷See discussion, *supra*.

³⁸Bracketed material in this quotation are the Court’s footnotes.

examination³⁹ of the legislative history of the Suspension Act convinced it that the case before it *ought to have been* included within the scope of that Act.

“* * * the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive *which perfectly fits the situation at bar.*”⁴⁰ (*Ibid.*, 165 F.2d at 368.)

A more careful examination of the legislative history would undoubtedly have convinced the Court that whether or not the case before it *ought to have been* included within the scope of the Suspension Act, *it was not*.

Second, the Court was demonstrably in error in citing *Haas v. Henkel, supra*, as authority for the statement that it has been the law since 1910 that fraud in the False Claims Act has a meaning not restricted to pecuniary or property loss. The pertinent sections of the False Claims Act were not enacted until October 23, 1918 (C. 194, 40 Stat. 1015); and until 1934 those sections were limited in applica-

³⁹We say “cursory examination” with deference to the Court for it failed to refer either to the Committee reports appended hereto as an appendix, to the genesis of the Suspension Act, to the relationship between it and the War Contract Settlement Act, the Surplus Property Act, and Title 41 (Public Contracts). Its failure to do so may be accounted for by the fact that Title 18 had not yet been recodified and the legislative material now so easily found in the Revisor’s Notes was not then so readily available. Also the Court failed to refer to the Supreme Court cases—*Noveck, Scharton* and *McElvain*—which placed the Suspension Act in its proper historical and legislative perspective.

⁴⁰Of course, the *Bridges* case, as we have pointed out, does not fit into this picture at all.

tion to false statements involving pecuniary or property loss to the United States. (See *United States v. Cohn, supra*, and *United States v. Gilliland, supra*.) The error is of no consequence with respect to the construction of the False Claims Act which is not involved here but it is of great consequence in connection with the construction of “defrauding” as employed in the Suspension Act which is involved here.

The Court of Appeals in the *Gottfried* case fell into the same error as the trial Court in this case by failing to refer to the Supreme Court’s construction of “defrauding” in the 1921 and 1926 provisos in the *Noveck* and kindred cases—a construction which limited the applicability of those identical predecessors to the Suspension Act to offenses in which the intent to defraud in a pecuniary sense was an essential element. Both the Court of Appeals in the *Gottfried* case and the trial Court below failed to refer to the reenactment in the present Suspension Act of the pertinent identical language of the 1921 and 1926 provisos after such restrictive interpretation by the Supreme Court. Both Courts failed to refer to the House and Senate Committee reports on the Act of August 24, 1942, which specifically referred to the 1921 proviso and indicated that the present Suspension Act was designed to fulfill the same purpose in connection with the huge governmental expenditures of money during the war. Both Courts based their holdings primarily upon the construction of “defrauding” in the general conspiracy statute which

includes the words "or for any purpose" and carried over that construction to the Suspension Act in which those words of broadening scope are lacking. We submit that in the light of all the factors mentioned above, which both the Court of Appeals in the *Gottfried* case and the trial Court below ignored, such a construction of the Suspension Act is totally unwarranted. On the contrary, the construction of the Suspension Act by the Court of Appeals for the District of Columbia in the *Marzani* case which took into consideration the factors mentioned above, is the only construction which is possible.

(d) The Court which decided it has since distinguished the *Gottfried* case from the situation here presented.

The Court of Appeals for the Second Circuit has, since the ruling of the Court below, distinguished the *Gottfried* case by its decision in *United States v. Obermeier*, 186 F.2d 243 (2 Cir., 1950), cert. den. U.S., 71 S.Ct. 573, 95 L.ed. 452 (1951).⁴¹ In the *Obermeier* case the Court followed the interpretation given to the Suspension Act in the *Noveck*, *Scharton* and *McElvain* cases, *supra*, and said that the statute of limitations was suspended "only when fraud or attempted fraud * * * 'is an ingredient under the statute defining the offense * * *'" (*Ibid.*, 186 F.2d at 257.) It followed this statement with a footnote reference to *Gottfried v. United States*—the only refer-

⁴¹L. Hand, C.J., who wrote the *Gottfried* opinion, was one of the bench which decided the *Obermeier* case.

ence in the entire opinion to the *Gottfried* case. The reference reads:

“In *U. S. v. Gilliland*, 312 U. S. 86, the offense was so defined as to make fraud an ingredient. So, too, in *Gottfried v. U. S.*, 165 F.(2d) 360 (C.A. 2) as we there interpreted the statute creating the crime.” (*Ibid.*, 186 F.2d at 257 ftnt. 64.)

The Court here couples the *Gottfried* case with *United States v. Gilliland*, *supra*, which as we have already pointed out deals only with the question of the substantive elements of a cause of action and not with the question of the outlawing of a cause of action by the operation of the statute of limitations. The Court's use of the words “as we there interpreted *the statute creating the crime*” with reference to the *Gottfried* case, indicates that the present view (and the correct one, we submit) of the Court of Appeals for the Second Circuit is that fraud was an ingredient of the statute defining the offense in the *Gottfried* case and therefore (and *only* therefore) was the Suspension Act applicable in that case. Since fraud is not an ingredient of the offenses at bar, the reasoning of the *Obermeier*, and not the *Gottfried* case is controlling.

E. CONCLUSION AS TO THE APPLICABILITY OF THE SUSPENSION ACT.

From all of the foregoing it appears that reliance upon the Suspension Act to save this prosecution and to take it out of the operation of the three-year statute of limitations is not well-founded. The legis-

lative history and judicial interpretation of the Suspension Act establish that that Act tolls the operation of the statute of limitations only where intent to defraud the United States and the presence of pecuniary or property loss to the United States are essential elements of the offenses involved. The foregoing elements which must be present to make the Suspension Act operative are not present with respect to any of the counts of the indictment in this case. The Court below erred in interpreting and applying the Suspension Act because of its reliance upon cases which are not germane and because of its failure to give effect to the cases which are dispositive of the issue.

II.

SECTION 21 OF THE ACT OF JUNE 25, 1948, DOES NOT "SAVE" THIS PROSECUTION FROM THE OPERATION OF THE STATUTE OF LIMITATIONS.

The Act of June 25, 1948, created the present Title 18 of the United States Code. Section 21 of that Act⁴² provides for the repeal of specifically enumerated statutes which were deemed inconsistent with the provisions of the new code and declares that:

“Any rights or liabilities now existing under such sections or parts thereof [i.e., the statutes repealed] shall not be affected by this repeal.”

Prior to the enactment of Title 18, the statute of limitations in the Nationality Code was five years

⁴²*Supra.*

(8 U.S.C.A. 746[g]); this five-year period of limitations was expressly repealed by Section 21. The precise issue here is whether the quoted language operates to preserve to the Government the five-year period of limitations within which to prosecute for the offenses charged under Counts 2 and 3 of the indictment.⁴³

In a decision squarely in point the Court of Appeals for the Second Circuit has held that Section 21 does not have that effect. (*United States v. Obermeier*, 186 F.2d 243 [2 Cir. 1950], cert den. U.S., 71 S. Ct. 573, 95 L.ed. 452 [1951].) In that case the defendant was indicted for violating 8 U.S.C. 746(a) (1)—the identical offense charged in the second count of the indictment at bar—in that he falsely stated under oath in the course of a naturalization proceeding that he had not been a member of the Communist Party. “His sole defense to these counts is that the indictment was barred by the statute of limitations” (*Ibid.*, 186 F.2d at 250), the indictment having been returned more than three but less than five years after the offenses were committed. The decision of the Court of Appeals for the Second Circuit carefully considers the legislative history and background of the several statutory provisions involved, the judicial interpretations given to words of like import, and other relevant matters—from all of which it concludes that the language of Section 21 did not preserve to

⁴³Section 21 does not apply in any event to Count 1 of the indictment since both before and after the recodification of 1948 the period of limitations for the offense there described was three years.

the Government the five-year period within which to prosecute for the offense in question.

An independent examination of the considerations which impelled the Court of Appeals for the Second Circuit to reach its conclusion in the *Obermeier* case serves only to reenforce the correctness of its views.

In order to determine the issue raised by the Government's contention it is necessary to review the legislative history of the revision of which Section 21 is a part, the legislative history of the three-year statute of limitations (18 U.S.C. 3282), and the legislative history of Section 21 itself. Such a review demonstrates clearly that Congress did not intend to include statutes of limitations in the saving clause. Furthermore, the application of usual rules of statutory construction to the language used in Section 21 demonstrates that Section 21 cannot save this prosecution from the effect of the statute of limitations.

A. THE LEGISLATIVE HISTORY OF THE REVISION OF THE CRIMINAL CODE OF THE UNITED STATES.

Title 18 of the United States Code, the revision of the entire body of federal criminal law and procedure, was the result of years of exhaustive and painstaking work on the part of special committees of lawyers and judges appointed by the Congress and the Judiciary Committee of both its houses. Serving on and with these committees were, among others, Senator (now Attorney General) McGrath, Floyd E. Thompson, former Chief Justice of the Illinois Supreme Court; Justin Miller, formerly of the Court of Appeals for

the District of Columbia; John T. Cahill, former United States Attorney for the Southern District of New York; George F. Longsdorf, member of Advisory Committee on Federal Rules of Criminal Procedure; and Alexander Holtzoff, special assistant to the Attorney General (now a United States District Judge in the District of Columbia).

All of these authorities, in consultation with the bench, bar, and law schools throughout the country, worked on the revision. On June 25, 1948, the revision was enacted and became effective on September 1, 1948.

At the Congressional hearings concerning this legislation⁴⁴ statements were made which demonstrate Congressional purpose:

Representative Robison:

“One of the real main purposes of this act is to cut out the obsolete laws, acts that have been repealed by a special revision of some measure through the Congress, or have been repealed or come to an end by their own terms; and then to get these laws in better shape, to build up a code of 50 titles, the two most important of which the experts, those in our high courts, and our lawyers, say are titles 18 and 28.

* * * * *

“We hope that we are going to have all the laws properly classified and properly titled, so that we can turn to them quickly and easily and so that

⁴⁴Which was coupled with the legislation codifying the new Judicial Code, i.e., 28 U.S.C.

they will be understandable, not only to the judges and the lawyers but to laymen.

“The Supreme Court has felt so much concerned about the matter that they appointed a committee to cooperate in this revision. Many of the judges of our Federal circuit courts, the courts of appeal, the American Bar Association—every one has had a hand in these matters.”⁴⁵

Representative Devitt:

“In these two bills the laws have been rewritten in direct and simple language. Hundreds of obsolete and irrelevant provisions are eliminated and will be repealed. Uncertainty will be ended, and constant references to the Statutes at Large will no longer be necessary. If enacted these bills will make the contents positive law as distinguished from *prima facie* evidence of the law. It will undoubtedly be to the great benefit of the courts, lawyers, lawmakers, and the general public that these revisions receive congressional approval in order to make our statute law a systematic and orderly arrangement of congressional action.”⁴⁶

Representative Keogh:

“We selected 18 and 28, Mr. Chairman, for the reason that those were the two titles that by our experience and information cried out the loudest for a revision and for a restatement and for pos-

⁴⁵Hearings before the Subcommittee No. 1 of the House Judiciary Committee on H.R. 1600 and H.R. 2055, March 9, 1947. (United States Code, Congressional Service, 80th Cong., 2d Sess., p. 2687.)

⁴⁶*Ibid.*, p. 2688.

sible enactment into positive law, and we selected those two titles, too, particularly for the reason that there was pending under the acts granting the authority to the Supreme Court and its advisory committees, the adoption of the rules of civil procedure and of criminal procedure, and we proceeded upon the hypothesis that the adoption of such rules would necessarily require substantive revision of the then existing laws.”⁴⁷

Justin Miller:

“As the work went forward, I found myself reading the drafts prepared by the editors from two other points of view as well: First, that of the judge, who is frequently engaged in interpreting and applying the sections of the Criminal Code; second, as a trial lawyer, hunting for the law applicable to particular cases.

“I may say that I was for 4 years a prosecuting attorney, so I had particular interest in that respect.

“As a judge I was concerned with simplification and clarification of language, the removal of ambiguities, uncertainties, duplication, redundancy, and conflict. To the achievement of this objective the editorial board was conscientiously and effectively alert.”⁴⁸

The Department of Justice which instituted and is pressing this prosecution, participated in the revision of Title 18. Fred E. Strine, of the Department's Criminal Division, testified:

⁴⁷*Ibid.*, p. 2691.

⁴⁸*Ibid.*, pp. 2697-2698.

“I should add to what Mr. Baynton has said regarding H. R. 1600 that the Department is in favor of a codification of the various titles of the United States Code, and H. R. 1600 is a very important one. Since the criminal laws have not been codified since 1909, a revision of title 18 is probably overdue and the early enactment of this bill would be very advantageous from our standpoint, I believe.”⁴⁹

Various other witnesses were heard to the same effect: That the purpose of the revision was to remove obsolete statutes, rewrite the law in simple, direct language, make it uniform, and end uncertainty.⁵⁰

This impressive legislative history⁵¹ demonstrates that the purpose of the Congress in enacting the new Title 18, of which the three-year statute of limitations

⁴⁹*Ibid.*, p. 2721.

⁵⁰Judge Albert B. Maris, United States Circuit Judge for the Third Circuit, testified to the participation of a committee of judges from his circuit in these revisions. The hearings also demonstrate that the joint editorial staffs of the West Publishing Company and the Edward Thompson Company cooperated in the revision under authority of the Congress.

Among others who were heard from were Professor James William Moore of Yale Law School; William W. Barron, Chief Revisor, West Publishing Company; Judge John B. Sanborn, United States Circuit Judge for the Eighth Circuit; Walter P. Armstrong, former President of the American Bar Association; Harvey T. Reid, Editor-in-Chief of the West Publishing Company; Leland Tolman of the Administrative Office of the United States Courts; Charles J. Zinn, Law Revision Counsel, Committee on the Judiciary; and Judge John J. Parker, United States Circuit Judge for the Fourth Circuit.

House Report No. 304, 80th Congress, First Session, dealing with revision of Title 18, describes the purpose of the new title and the background of the revision. Generally the report follows the testimony of the witnesses just quoted. (*Ibid.*, pp. 2434, *et seq.*)

⁵¹*Ex parte Collett*, 337 U.S. 55 (1949); *United States v. National City Lines*, 337 U.S. 78 (1949).

(18 U.S.C. 3282) is an integral part, was to place, insofar as humanly possible, between the covers of one volume all the law relating to crimes and criminal practice in the Federal Courts so that all persons—judges, lawyers, Government counsel and even laymen—could with certainty know and understand what the criminal law of the United States was.

In the face of such a legislative history, heed must be given, in applying any particular section, to the over-all legislative purpose. Clearly no one section of the Code is to be applied in a manner which will destroy or undermine the harmony which Congress intended to create or which will restore the uncertainties which Congress intended to remove.

It has long since been regarded as an elementary rule of statutory construction (even apart from such a legislative history) that all sections of a statute are to be construed together for the purpose of giving effect to the entire act. (*Constanzo v. Tillinghast*, 287 U.S. 341 [1932]; *United States v. American Trucking Associations*, 310 U.S. 534 [1940]; *Great Northern Ry. Co. v. United States*, 315 U.S. 262 [1942]; *United States v. Dotterwich*, 320 U.S. 277 [1943]; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 [1945].)

In *Brown v. Duchesne*, 19 How. 183 (1857), the Court said:

“* * * it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole

statute (or statutes on the same subject) and the objects and policy of the law as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature, as thus ascertained, according to its true intent and meaning.” (*Ibid.*, in 15 S.Ct. at 599.)

In *Ozawa v. United States*, 260 U.S. 178 (1922), the Court said:

“It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look into the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.” (*Ibid.*, at 194.)

In *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934), the Court said:

“* * * the expounding of a statutory provision strictly according to the letter without regard to other parts of the act and legislative history would often defeat the object intended to be accomplished.” (*Ibid.*, at 464.)

Thus, when it appears, as here, that Congress in enacting Title 18 intended to establish one uniform and harmonious body of criminal law for the United

States, then the words in any one clause—including a saving clause—must be construed (if “construction” is needed) so as to give effect to the over-all intent and purpose of Congress and not to destroy it. It is hardly conceivable that Congress, having gone to such pains to enact a uniform criminal code, proposed to undo all of its work by the saving clause in a subsidiary section of the statute.

**B. THE LEGISLATIVE HISTORY OF 18 U.S.C.A. 3282—THE
THREE-YEAR STATUTE OF LIMITATIONS.**

As far as 18 U.S.C.A. 3282 is concerned, there is really no problem of statutory interpretation or even need for recourse to legislative history, since the Court is not called upon to construe or interpret language which is clear and unambiguous. (*Osaka Shosen Kaishi Line v. United States*, 300 U.S. 98 [1937]; *Continental Casualty Co. v. United States*, 314 U.S. 527 [1942]; *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 [1947]; *Ex parte Collett*, 337 U.S. 55 [1949].)

Thus, when a statute of limitations provides that no person shall be prosecuted for an offense unless the indictment is found “within three years next after such offense shall have been committed”, and when it is clear that the indictment was not so found, that ought to end the matter. True, the statute in question has a qualification, “except as *expressly* otherwise provided by law * * *” But this is of no avail to the Government unless it can establish that there is an

express provision of law otherwise—not a provision by implication or inference.⁵²

No “express” provision otherwise than a three-year period of limitations appears anywhere in the new Title 18 which could conceivably govern this case. The only express reference to any period of limitations in excess of three years relating to the offenses alleged in the indictment is the *expressed repeal*⁵³ of 8 U.S.C.A. 746(g), the five-year statute of limitations of the old Nationality Code. (*United States v. Obermeier, supra*, at 250.)

However, should there be any question about the literal meaning of the words of 18 U.S.C.A. 3282, its legislative history demonstrates that it alone governs the case at bar and that its three-year limitation is controlling.

Most significant in that regard is the fact that the revisers who were acting on behalf of the Congress made it clear that they consciously intended to do away with the five-year statute of limitations found in the old Nationality Code and that they consciously

⁵²“Expressly” is defined to mean “with definite, stated intent or application; exactly and unmistakably; in direct terms. (Funk & Wagnall’s *New Standard Dictionary*, 1920 ed.) “Express” is defined to mean “made known distinctly and explicitly, and not left to inference or implication * * * manifested by direct and appropriate language * * * The word is usually contrasted with ‘implied’.” (Black’s *Law Dictionary*, 1933 ed.)

⁵³Act of June 25, 1948, c. 645, 80th Cong., §21. (United States Code, Congressional Service, 80th Cong., 2d Sess., p. 2423.)

and deliberately reduced the period of limitations to three years.

In this connection the reviser's notes following 18 U.S.C.A. 3282 are indeed significant. We quote them in full.

“Section 3282—Section Revised

“*Based on section 746(g) of title 8, U.S.C. 1940 ed., Aliens and Nationality, and on title 18, U.S.C., 1940 ed., §582 (R.S. §1044; Apr. 13, 1876, ch. 56, 19 Stat. 32; Nov. 17, 1921, ch. 124, §1, 42 Stat. 220; Dec. 27, 1927, ch. 6, 45 Stat. 51; Oct. 14, 1940, ch. 876, title I, subchap. III, §346(g), 54 Stat. 1167).*

“Section 582 of title 18, U.S.C., 1940 ed., and section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, *were consolidated*. ‘Except as otherwise expressly provided by law’ was inserted to avoid enumeration of exceptive provisions.

“The proviso contained in the act of 1927 ‘That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information,’ was omitted as no longer necessary.

“*In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner.*”

Thus it is clear⁵⁴ that Congress intended that *all* prosecutions on and after the effective date of the new Title 18 to be governed by the three-year statute of limitations. Furthermore, it intended the three-year limitation to apply to the Nationality Code as well as to all other laws, and it specifically intended *to reduce*, from five to three years, the statutory period within which prosecutions could be brought for violations of that code. Whatever may be the Court's views as to the heinousness of the offenses here charged or as to how long the Government ought to have to prosecute for offenses of this nature, Congress has clearly indicated its view that three years is ample and that if the Government fails to act within that period of time, the prosecution is barred.

Such a deliberate legislative effort to provide for a uniform period of limitations with respect to all crimes must be respected by this Court. It is not conceivable that the objective thus sought to be achieved could be frustrated by a strained construction or interpretation of the words of Section 21. Furthermore, an examination of the history as well as the language of Section 21 shows that such a result is not necessary.

**C. THE LEGISLATIVE HISTORY OF SECTION 21 OF
THE ACT OF JUNE 25, 1948.**

The legislative history of Section 21 itself indicates that it was not enacted to upset the over-all legislative

⁵⁴ "The reviser's notes are so obviously authoritative in perceiving the meaning of the Code, that the Government itself * * * refers to them in its brief in this case." (*United States v. National City Lines*, 337 U.S. 78 at 81 [1949].) See also *Stainback v. Ho Hock Ke Lok Po*, 336 U.S. 368 at 376, *ftnt.* 12 (1949).

purpose. It was enacted for a specific purpose which can be given effect without disturbing the harmony which the balance of the Act sought to establish.

As William W. Barron, the chief reviser of Title 18, said, Section 21 of the Act,

“* * * provides for the specific repeal of hundreds of sections enumerated in the Schedule of Laws Repealed. These include all laws incorporated in the revision, plus many superseded and obsolete criminal laws. The schedule was carefully checked and rechecked many times. *This method of specific repeal will lift from the courts the onerous task of ferreting out implied repeals.*”⁵⁵

And as Charles J. Zinn, General Counsel for the Committee on the Revision of Laws, said:

“* * * we have a complete repeal provision * * * in which we specifically repeal all existing law which is incorporated in the new code.

“Now, that is most important. Heretofore, in the preparation of the codification of laws, there have been indefinite repeal provisions to the effect that all laws or parts of laws in conflict therewith are hereby repealed. That is an incomplete job. They leave it up to the courts to decide what laws are repealed.

“In this bill, we have set up a new section of the bill * * * listing chronologically all of the laws which we repeal.”⁵⁶

⁵⁵Hearings before the House Committee on the Revision of the Laws on H.R. 5450, December 6, 1944. (United States Code, Congressional Service, 80th Cong., 2d Sess., p. 2669.)

⁵⁶*Ibid.*, p. 2701.

Thus it is clear that Section 21 was not enacted in order to bring back into the criminal law and procedure that which had been repealed and was inconsistent with the other portions of Title 18, among which other portions was included the all-embracing three-year statute of limitations contained in §3282. On the contrary, the purpose of §21 was to remove from the Courts the necessity of engaging in judicial construction or of implying or construing or inferring what Congress intended. Its purpose was to specify what was being repealed⁵⁷ and to leave no doubt on that score, to the end that in the statute itself the statutory purpose would be realized, and to prevent the frustration of the legislative intent which sometimes results from the judicial process of “ferreting out implied repeals”.

Thus, §21 itself must be construed—if “construed” it must be—in a manner consistent with the avowed objectives of the entire revision. It must not be seized upon as a handle to negate what Congress sought to do in the balance of the Act. Specifically, it must not be used to undo what Congress did in 18 U.S.C. 3282—i.e., consciously and deliberately fix a three-year statute of limitations for the very crimes involved in this proceeding.

D. THE WORDS USED IN SECTION 21 HAVE NO APPLICATION TO STATUTES OF LIMITATIONS.

We have already pointed out that it is an elementary rule of statutory construction that an enactment

⁵⁷Which included, as we have pointed out, the five year limitation of the Nationality Code.

must be treated as a harmonious whole, that words are not to be torn from their context and given a meaning which would destroy the over-all purpose which the legislature intended, and that, where necessary, the literal meaning of words must be sacrificed in order to achieve this beneficent purpose. (*Ozawa v. United States, supra.*)

Here it is not necessary to sacrifice the literal meaning of words since traditionally statutes of limitations have never been regarded as either "rights" or "liabilities". Such statutes provide neither a "right" nor do they impose a "liability". They simply prescribe the period during which rights may be asserted or liabilities imposed; of themselves they create neither rights nor liabilities.

In *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. 386 (1869), it was said of such statutes:

"They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted."
(*Ibid.*, in 19 S.Ct. 259.)

If statutes of limitation "do not confer any right of action", they clearly do not and cannot impose any "liability". If there is no "right" conferred on the one side, there is no "liability" imposed on the other. (*Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 [1944]; *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 [1945]; *Holmberg v. Armbracht*, 327 U.S. 392 [1946]; *Kavanagh v. Noble*, 332 U.S. 535 [1947].)

Lovely v. United States, 175 F.2d 312 (C.C.A. 4, 1949), cert. den. 338 U.S. 834 (1949), cited to the Court below in support of the Government's position on this point, is not germane. In that case the question was whether Section 21 "saved" a *punishment* provided for in the old code—and which was reduced by the new Title 18—in *the case of a prosecution begun under the old code* and in which sentence was pronounced after the new code went into effect. It is perfectly clear that the word "liability" in Section 21 has reference to punishment since a punishment has been traditionally regarded as a "liability".⁵⁸ Furthermore, in that case the proceeding was commenced before the effective date of the new Title 18 and the matter was *sub judice* when the new Title 18 went into effect. Here Title 18, with its three-year statute of limitations, had been the law of the land for some nine months before the Grand Jury returned the indictment.

The Court of Appeals in the *Obermeier* case, basing itself clearly upon the adjudicated cases relating to periods of limitations rather than to punishment, held:

"* * * a statute of limitations is considered no part of a 'right' or 'liability', but as affecting the remedy only. On that basis it has been held

⁵⁸"To be liable to a fine is to be punishable by a fine." (*United States v. Cobb*, 163 Fed. 791, 793 [D.C. Md., 1906].)

"* * * this word 'liability' is intended to cover every form of punishment to which a man subjects himself * * *" (*United States v. Ulrici*, 28 Fed. Cas. No. 16,594 at p. 329 [D.C. Mo. 1875].)

(See also *United States v. Chouteau*, 102 U.S. 603 [1881], and *Huntington v. Attrill*, 146 U.S. 657 [1892].)

that until the expiration of the period named in such a statute, the period may validly be lengthened or shortened by a later statute, and that where no criminal liability is involved the legislature may revive a right barred by a former statute of limitations. In other words * * * a limitation statute establishes no vested substantive right or unalterable substantive liability. We know, of course, that the words 'substance,' 'procedure,' and 'remedies' have no fixed, invariant, meanings, and that what they signify depends upon the particular context. We think, however, that, for the reasons we have canvassed, the context of 1 U.S.C. §109 and §21 of the 1948 Act show that they were not intended to include, in 'rights' or 'liabilities,' statutes of limitation." (*United States v. Obermeier, supra*, at 254-255.)

Since a statute of limitations creates neither a right nor confers a liability, Section 21 does not apply to 18 U.S.C.A. 3282.

E. ENACTING SECTION 21 IS NOT THE PROPER WAY TO SAVE A PERIOD OF LIMITATIONS; CONGRESS KNEW THE PROPER METHOD BUT DID NOT USE IT IN THIS CASE.

When Congress specifically desired or intended to enable the Government to prosecute subsequently committed crimes within a period fixed by an earlier statute of limitations, it made its purpose crystal clear by the language it used in the saving clause.

The Court of Appeals in the *Obermeier* case, *supra*, cites examples of legislation which demonstrate that Congress did not consider statutes of limitations saved by general savings clauses using such words as "any

liability" (R.S. §13) or "offenses" (R.S. §5598), but recognized the necessity of enacting separate sections to achieve the desired end—sections which used such precise language as "all acts of limitation" (R.S. §5599),⁵⁹ (*United States v. Obermeier, supra*, at 251-253).

This type of legislation was carried forward into 1 U.S.C.A. 110, which provides as follows:

"All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, embraced in the Revised Statutes and covered by the repeal contained therein, shall not be affected thereby, but suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made."

This statute shows that when Congress intended to save acts of limitation it knew that the best and most unambiguous way to do so was to say so in just so many words.

It might appear at first blush that 1 U.S.C.A. 110 is an answer to the entire argument with respect to the "saving" of the five-year statute of limitations. However, §110 merely applies to statutes of limitations "embraced in the Revised Statutes", and the

⁵⁹The Court also points out that legislation recognizing the same distinction between "criminal offenses" and statutes of limitations was carried forward into §§533 and 534 of the Criminal Code of 1909 (34 Stat. 1159).

five-year statute of limitations which was found in §746(g) of Title 8 was never part of the Revised Statutes⁶⁰ having been enacted as §24 of the Act of June 29, 1906 (34 Stat. 603), whereas the Revised Statutes were enacted in 1873.⁶¹

Some legislation contains language broad enough to save both substantive rights and liabilities and their remedies, including statutes of limitations. For example, in the Nationality Code of 1940, the Congress said:

“For the purpose of the prosecution of all crimes and offenses against the naturalization or citizenship laws of the United States which have been committed prior to the date when this chapter shall go into effect, *the existing naturalization and citizenship laws* shall remain in force and effect.” (8 U.S.C.A. 746[h].)

Had Congress intended either to save remedies by a separate section dealing with such matters, as distinguished from §21 dealing with “rights or liabilities” or by combining remedies with rights and liabilities as it did in the Nationality Code of 1940, it would have been easy for it to have said so. (See *United States v. Obermeier, supra*, at 255, particularly footnote 57.)

⁶⁰See *United States v. Obermeier, supra*, at 253.

⁶¹As a matter of fact, at one time the Attorney General of the United States suggested to Congress that in his opinion §110, which saved “all acts of limitation * * * embraced in the Revised Statutes”, ought to be broadened so that acts of limitations found in other statutes would also be saved. Congress rejected this suggestion and refused to broaden the provisions of §110. See *United States Code* (1940 ed.), 1 U.S.C. 29(a) and notes following.

F. CONCLUSION AS TO THE INAPPLICABILITY OF SECTION 21
OF THE ACT OF JUNE 25, 1948.

From all of the foregoing it appears that reliance upon §21 of the Act of June 25, 1948, to save prosecution under the second and third counts of the indictment and to take it out of the operation of the three-year statute of limitations, is not well-founded. The legislative history of Title 18 in general, of 18 U.S.C. 3282, and of §21 itself, as well as the rules of statutory construction, will not permit such a construction. The traditional significance of the word "liabilities" is directly to the contrary of such a construction. A comparison of this section with other Congressional "saving clauses" demonstrates that Congress did not here use the words of broad scope it has used on other occasions to achieve a more comprehensive result.

III.

EXCEPTIONS TO STATUTES OF LIMITATIONS MUST BE
STRICTLY CONSTRUED AGAINST THE GOVERNMENT AND
LIBERALLY CONSTRUED IN FAVOR OF THE ACCUSED.

It must be remembered that the argument of the Government in connection with §21 of the Act of June 25, 1948, as well as in connection with the Suspension Act, *supra*, is in effect an effort to carve out an exception from the general statute of limitations. For the reasons we have heretofore urged, we contend that such an exception cannot properly be carved out at all. Even if it could, we call the Court's attention

to the well-established rule that statutes of limitations are statutes of repose which are intended to operate for the benefit of an accused and that they must always be strictly construed against the Government.

United States v. McElvain, 272 U.S. 633 (1926), involved an indictment for conspiracy to defraud the Government with respect to its internal revenue by conspiring to file false income tax returns. The indictment was returned more than three years but less than six years after the commission of the alleged offenses. There was a general three-year statute of limitations but there was also a proviso for a six-year period of limitations in certain cases. With respect to the Government's argument that the proviso rather than the general statute applied, the Court said:

"The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly and held to apply only to cases shown to be clearly within its purpose." (*Ibid.*, at 639.)

Here, as we have shown above, the purpose of §21 was to eliminate the necessity of "implied repeals" and was not to upset the harmony which was sought to be created by the enactment of the new Title 18. Clearly, §21 must be limited to "cases shown to be clearly within its purpose." (*United States v. Dickson*, 15 Pet. 141 [1841]; *Ryan v. Carter*, 93 U.S. 78 [1878]; *United States v. Noveck*, 271 U.S. 201 [1926].)

This rule of construction applies not only to statutes of limitations but to all criminal statutes.

In *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 [1926]), the Supreme Court said of a penal statute:

“[It] is not to be extended to cases not clearly within its terms or to those exceptional to its spirit or purpose.” (*Ibid.*, at 18.)

And in *Giles v. United States*, 84 F.2d 943 (5 Cir., 1936), the Court said:

“It is settled law that criminal statutes are to be strictly construed and may not be extended by implication unless that is clearly demanded by their terms.” (*Ibid.*, at 945.)

See also:

United States v. One Airplane, 23 F.2d 500 (S.D.Calif., 1927), and

United States v. Obermeier, *supra*, at 256, *ftnt.* 59.

IV.

CONCLUSION.

We have demonstrated above:

1. That the Wartime Suspension Act is not applicable to this prosecution since the offenses here charged do not involve as essential elements thereof either the intent to defraud the United States or pecuniary or property loss to the United States, and since the presence of both of these elements is required before the Suspension Act can come into play. This conclusion is compelled by the legislative history

and judicial interpretation of the Suspension Act and its predecessors. It is further compelled by the interpretation of the Suspension Act by the Courts of Appeals in the *Marzani* and *Obermeier* cases. The effort to apply the *Gottfried* case to the case at bar cannot be sustained.

2. That § 21 of the Act of June 25, 1948, does not save the prosecution for the Government. The legislative history of the revision of Title 18 and of the three-year statute of limitations contained in § 3282 of that title, as well as of § 21 itself, compels such a conclusion as does the judicial interpretation of the meaning of the words used in § 21. Furthermore, it is clear that in enacting § 21, Congress used words of narrow scope and import, whereas on other occasions when it intended to preserve to the Government a prior statute of limitations it deliberately chose words of broader meaning and significance to achieve the end desired. Finally, the comments of the revisers on § 3282 make it clear that it was the legislative intent to reduce, as of the effective date of the new Title 18, the period of limitations to three years for the very crimes charged in the second and third counts of the indictment.

3. To the foregoing considerations must be added the fact that we are here dealing with a statute of limitations whose beneficent purpose should be accomplished by the Court. The Government, in seeking to carve out from the general statute of limitations exceptions and provisos, has a heavy burden which it has clearly failed to meet. Such exceptions and pro-

visos are, of course, always strictly construed against the Government and the general statute of limitations is always liberally construed in favor of the accused.

POINT II.

APPELLANT BRIDGES WAS DENIED DUE PROCESS OF LAW BY THE SUCCESSION OF PROCEEDINGS AGAINST HIM CONCERNED WITH THE SAME ISSUE OF FACT.

(Specification of Errors 7, 8, 9, 11, 12, 13, 14, 19, 20.)

Appellant Bridges has twice been subjected to deportation proceedings¹ involving the same charges and raising the same issues as are involved in and raised by the indictment in this case. Since there is an identity of the scope and issues of the deportation proceedings and the present criminal proceeding, there is here applicable that principle of law "which seeks to bring litigation to an end and to promote certainty in legal relations". (*United States v. Munsingwear, Inc.*, 340 U.S. 36 [1950].)

During the litigation which followed the second deportation proceeding the question here raised was not squarely passed upon by the Supreme Court since the decision went off upon other grounds. However, that Court, as we shall see below, indicated quite clearly that legal standards normally applicable to criminal cases were equally applicable in deportation proceedings.

¹As we have pointed out above, he was, prior to the deportation proceeding, subjected to a series of administrative investigations covering the same subject matter.

In the second deportation proceeding, the District Court² and this Court³ both thought that the 1940 amendment to the deportation statute served to extend the period into which the inquiry might be had, thus making the charge against Bridges broader and different in the second deportation case from what it was in the first. Be that as it may,⁴ it is clear that the charge against him in this case is identical with the charge against him in the second deportation case.

The essence of the case against Bridges in both deportation proceedings and in the present case was that at some time since his entry into the United States in 1920, he joined or became affiliated with the Communist Party.⁵ The parties to the proceeding were always the same.⁶ The type of evidence given

²*Ex parte Bridges*, 49 F. Supp. 292, 297 (D.C. Calif., 1943).

³*Bridges v. Wixon*, 144 F.2d 927, 936 (9 Cir., 1944).

⁴This view will not bear analysis. With respect to Bridges' relationship to the Communist Party, the question of whether the offenses in the two deportation proceedings were different is a question which calls for a practical and not a theoretical approach. (*Murphy v. United States*, 285 F. 801 [7 Cir., 1923]; *Wong Sun v. United States*, 293 F. 273 [6 Cir., 1923]; *Short v. United States*, 91 F.2d 614 [4 Cir., 1937].) It is not the theory expressed in the Government's formal charge but the evidence introduced which determines the question. (*Mathews v. United States*, 19 F.2d 7 [3 Cir., 1927]; *Ex parte Gagliardi*, 284 F. 190 [D.C. Wash., 1922].) If substantially the same offense is involved in both cases, exoneration at the first hearing is a bar to the second; and this result cannot be avoided by varying the phraseology of the pleadings (*Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275 [1933]), by alleging violations of additional or amended statutes (*Ex parte Gagliardi, supra*), or by introducing evidence of different overt acts as proof of the same offense. (*Short v. United States, supra*.)

⁵In the present case, the question of affiliation is not directly involved.

⁶The moving party in every instance was the United States of America, and the defendant in every instance was Harry Renton Bridges.

at all three hearings was the same, and its purpose in each instance was to prove Communist Party membership. The period covered by the testimony in all three cases was the same. It is not claimed by the Government that the testimony before Judge Foley is false by reason of any conduct or activities of Bridges subsequent to the decision of the Supreme Court in *Bridges v. Wixon, supra*. In no practical sense can the offenses charged in the deportation proceedings and in the present case be regarded as different from each other.

The evidence introduced in the present criminal case would have supported a deportation order under the law as it stood at the time of either one of the prior proceedings. Where the same proof would support either charge, the identity of charges is established (*In re Nielsen*, 131 U.S. 176 [1889]; *Carter v. McClaghry*, 183 U.S. 365 [1902]; *Burton v. United States*, 202 U.S. 344 [1906]; *Ebeling v. Morgan*, 237 U.S. 625 [1915]; *Tricito v. United States*, 4 F.2d 664 [5 Cir., 1925]; *Bertsch v. Snook*, 36 F.2d 155 [5 Cir., 1929]).

Viewed from the standpoint of the issues as framed by the charge made and the defense employed, the conclusion must be the same. At the time of the first hearing, two types of defense were legally available to an alien denying the proscribed relationship: (a) although he had once been a member or affiliate of the alleged subversive organization, the relationship had ceased to exist before the date of his

arrest; or (b) he had never been a member or affiliate of the organization.

The first deportation case was defended by Bridges on the theory that he had never been a member of the organization in question. The effect of the 1940 amendment to the Naturalization Act which was passed before the second deportation warrant was issued, was to remove the first defense above-mentioned. Therefore, as a matter of law as well as a matter of actual record, the second deportation proceeding involved only one defense, to-wit, that Bridges had never been a member of the Communist Party. That was the only defense open to him.

That is the precise defense which he raised in the instant criminal proceeding and is the only issue involved in this proceeding. Thus, the question of whether or not Bridges had ever been a member of the Communist Party is the only issue of fact which was tried and litigated in the present criminal case in the second deportation case, and in the first deportation case.

An issue of fact⁷ litigated and determined at one proceeding and essential to a decision therein, is conclusive between the parties hereto and in a subsequent proceeding, even though a different claim is involved (*United States v. Munsingwear, Inc., supra*; *United States ex rel. Harshman v. Knox County*, 122

⁷“The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps for the ground work upon which it must have been founded.” (*Burlen v. Shannon*, 99 Mass. 200, 203 [1868].)

U.S. 306 [1887]; *Ex parte Gagliardi, supra*). There is certainly no practical difference between the range of inquiry or the factual issues involved in any of the three proceedings.⁸

Both the Government and the trial court thought an important distinction existed because different witnesses were used in the criminal case than were used in either of the deportation proceedings.⁹ That fact is plainly immaterial. The protection against relitigation of the same issues cannot be nullified by bringing forward new evidence in a subsequent proceeding upon the factual issues which were involved in the former proceeding.

The Supreme Court has said:

“The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached.” (*Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691 [1895].)

⁸The Board of Immigration Appeals in the second deportation case recognized that this was true with respect to the relationship between the two deportation cases themselves, despite the amendment to the Naturalization Act, *supra*, and, citing *Wong Chow Gin v. Cahill*, 79 F.2d 854 (9 Cir., 1935), and *Wong Kam Chang v. United States*, 111 F.2d 707 (9 Cir., 1940), said:

“* * * there is a serious question whether an administrative agency should relitigate time after time the same *factual* issues in the same type of proceeding.” (*In re Harry Renton Bridges*, Before the Board of Immigration Appeals, Jan. 3, 1942, p. 52.)

⁹As a matter of fact, in his cross-examination (Tr. 5300), and in his argument to the jury (Tr. 7789), the chief Government prosecutor made much of the fact that none of the witnesses called in this criminal case had appeared in either of the prior proceedings.

And again:

“The estoppel resulting from the thing adjudged does not depend on whether there is the same demand in both cases, but exists, even although there may be different demands, when the question upon which the recovery of the second demand has, under identical circumstances and conditions, been previously concluded between the parties or their privies.” (*City of New Orleans v. Citizens Bank*, 167 U.S. 371, 396 [1897].)

Furthermore:

“* * * even newly discovered evidence does not prevent the application of res judicata. Many, perhaps a majority, of the cases in which the doctrine of res judicata is enforced are cases in which facts have been discovered after the adjudication, which, if they had been known at the former trial, might have changed the result.” (*People v. Prather*, 343 Ill. 443 [1931].)

See also *Kansas City v. Southern Surety Co.*, 51 S.W.2d 221 (Mo. App., 1932); *Roney v. Westlake*, 216 Pa. 374 (1907); 2 Freeman on Judgments (5th Ed.), § 624 et seq.

I. APPELLANT BRIDGES HAS BEEN SUBJECTED TO DOUBLE JEOPARDY.

The Court below rejected appellant Bridges' claim of double jeopardy upon the ground that jeopardy attaches only to crimes and that deportation is not punishment for crime. Well-reasoned authority suggests a contrary view.

The constitutional protection against double jeopardy is not limited in terms to criminal offenses.

“Nor shall any person be subjected for the same offense to be twice put in jeopardy of life and limb.” (United States Constitution, Fifth Amendment.)

The incidence of jeopardy depends not upon the form of the proceeding but upon its substance. The test is whether a penalty or punishment may be imposed for a public rather than a private offense.

“The term ‘penalty’ involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.” (*United States v. Chouteau*, 102 U.S. 246 [1881].)

“The test of whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual * * *” (*Huntington v. Attrill*, 146 U.S. 657 [1892].)

Civil proceedings to impose punishment for a non-criminal offense have been held to be governed by the principle against double jeopardy. (*United States v. Gates*, 25 F.Cas. No. 15,191 [S.D. N.Y., 1845]; *United States v. McKee*, 26 F.Cas. No. 15,688 [E.D. Mo., 1877]; *United States v. Lafranca*, 282 U.S. 568 [1931].)

That proceedings under the deportation laws are highly penal is not open to question.

“The statute in its effect upon the individual must be classed as penal * * * We regard forfei-

ture for misconduct of the privilege of an existing residence in the United States as a penalty.” (*Wallis v. Tecchio*, 65 F.2d 250 [5 Cir., 1933].)

“Thus deportation becomes as to aliens who have established a domicile here a decree of perpetual banishment and exile—regardless of fixed family and business ties and connections; and it more clearly carries a heavy burden of ‘possible human woe’.” (*Browne v. Zurbrick*, 45 F.2d 931 [6 Cir., 1930].)

As Mr. Justice Brandeis said in *Ng Fung Ho v. White*, 259 U.S. 276 (1922):

“[deportation] * * * may result also in the loss of both property and life or of all that makes life worth living.”

Not only have the Courts recognized the penal character of a deportation order as the foregoing demonstrates, but in the very Supreme Court decision which preceded by only five days the first overt act of the alleged conspiracy here, both Mr. Justice Douglas, for the Court, and Mr. Justice Murphy, concurring, applied constitutional safeguards which are normally associated only with criminal proceedings.

In determining whether Bridges’ cooperation with the Marine Workers Industrial Union made him in turn “affiliated” with the Communist Party within the meaning of the deportation statute, the Court had to consider the meaning of the term “affiliation” as used in the statute. Mr. Justice Douglas said:

“In that connection, it must be remembered that although deportation technically is not criminal

punishment * * *, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling * * *” (*Bridges v. Wixon, supra*, at 147.)

The Court concluded that the construction given to the term “affiliation” by the Attorney General was too broad and this, of course, was one of the grounds for its reversal of this Court’s judgment. The Supreme Court said that it was not for it to say whether the evidence would justify a finding of affiliation upon the narrower ground which, by analogy, the doctrines of criminal law required. And while it recognized that an act innocent on its face might be done for an evil purpose, it pointed out that:

“Where the fate of a human being is at stake, the presence of the evil purpose may not be left to conjecture.” (*Ibid.*, at 149.)

Similarly, the Court had before it a problem in connection with the admissibility of certain hearsay testimony. It recognized that in the ordinary administrative proceeding hearsay testimony was generally admissible. But because of the serious consequences which flowed from a deportation order, it insisted upon a more rigid requirement. Mr. Justice Douglas said:

“But they [the hearsay statements] certainly would not be admissible in any criminal case as substantive evidence * * * So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is

founded. There has been some relaxation of the rule in alien exclusion cases. But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land. It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet as was aptly stated in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431, 'But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.'

"Here the liberty of an individual is at stake. Highly incriminating statements were used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." (*Ibid.*, at 153-154.)

Mr. Justice Murphy considered what, if any, constitutional rights aliens had under the first ten amendments to the Constitution and what, if any, effect the inherent sovereign power to deport has upon those rights. He concluded that lawfully resident aliens as

well as citizens were entitled to the protection of the First and Fifth Amendments. Therefore he tested the deportation statute against the constitutional requirements of those amendments and concluded that the statute was invalid since it ignored the doctrine of personal guilt and substituted for it the doctrine of guilt by association. This, of course, is a concept that is peculiarly applicable to criminal proceedings. Yet Mr. Justice Murphy found that

“It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a ‘crime.’ Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation.” (*Ibid.*, at 163-164.)

Furthermore, Mr. Justice Murphy also applied to the deportation statute another constitutional protection which had theretofore been applied only in criminal cases. That was the clear and present danger rule.

“The deportation statute is further invalid under the ‘clear and present danger’ test enunciated in *Schenk v. United States*, 249 U.S. 47 * * *” (*Ibid.*, at 164.)

Since there was no evidence of any clear and present danger to the nation from the conduct or activities of Bridges, Mr. Justice Murphy concluded that:

“Deportation, with all its grave consequences, should not be sanctioned on such weak and unconvincing proof of a real and imminent threat to our national security.” (*Ibid.*, at 165.)

Not only in deportation cases but even in denaturalization cases the Supreme Court has applied constitutional guarantees which normally surround only criminal actions. (*Klapprott v. United States*, 335 U.S. 601 [1949].) This it has done because it has recognized that these cases are of such a nature and character as to require the application of guarantees normally thrown around criminal proceedings.

If it is recognized, as it has been, that standards of criminal law are applicable to deportation cases with respect to such matters as (1) the consequences which flow from those proceedings, (2) the type of evidence which may be adduced at such proceedings, (3) the burden of proof which the Government must sustain in such proceedings, (4) the rejection of non-criminal law doctrines such as guilt by association in such proceedings, and (5) the application of criminal law doctrines such as the clear and present danger rule in such proceedings, then it logically follows that the constitutional guarantees against double jeopardy must apply equally to such proceedings as it does to criminal proceedings in their narrowest sense.

The Supreme Court has recently recognized that the double jeopardy prohibition was aimed at “op-

pressive practices" irrespective of the form in which they were cast. (*Wade v. Hunter*, 336 U.S. 684 [1949].) Clearly the practices in which the Government is engaged so far as appellant Bridges is concerned, as revealed by the evidence before this Court, are the most "oppressive" one could imagine.

In the last cited case, Mr. Justice Murphy, in considering the application of the double jeopardy clause of the Fifth Amendment to the situation then before the Court, said:

"The harassment to the defendant from being repeatedly tried is not less because the army is advancing. The guarantee of the Constitution against double jeopardy *is not to be eroded away by a tide of plausible-appearing exceptions*. The command of the Fifth Amendment *does not allow temporizing* with the basic rights it declares." (*Ibid.*, at 694.)

Our research has failed to reveal a single case in which the question here posed has been ruled upon. We submit this is because never in the history of the Republic has an individual ever been subjected to the kind of persecution which it has been appellant Bridges' unhappy lot to suffer.

Considering that the objective of the Fifth Amendment is to guarantee against "oppressive practices" or "the harassment * * * from being repeatedly tried", it is clear that a violation of this guarantee is a denial of due process whether or not it is technically an instance of double jeopardy.

All of the essential elements of fairness, justice and proceeding in the due course of law which we have come to recognize as the essential elements of due process (Cooley, *Constitutional Limitations*, 7th Ed., Ch. 10 and 11) cry out against the kind of thing which has taken place with respect to appellant Bridges. It is no answer to say that technically prior proceedings were not of a criminal nature. A guarantee as basic as that which is contained in the Fifth Amendment is not to be disposed of by such technical arguments.

As was said in *Murphy v. United States*, 285 F. 801 (7 Cir., 1923), cert. den. 261 U.S. 617 (1923):

“The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader to which we must look to determine this issue.” (285 F. at 817.)

The fact, therefore, that in prior proceedings the Government was theoretically moving under a deportation statute and that in this proceeding it is theoretically moving under a criminal statute should not and does not deprive appellant Bridges of the constitutional protection of the Fifth Amendment. The evidence and the issues involved in all of the proceedings, including the present one, are identical.

II. APPELLANT HAS BEEN DENIED DUE PROCESS BY REASON OF THE REPEATED PROCEEDINGS AGAINST HIM.

Even if the constitutional prohibition against double jeopardy were technically confined to crimes, due process would, as we have indicated, reject the notion that a man may twice be tried for violation of the same statute.

The Supreme Court has made it clear in the past several years that the due process clauses in both the Fifth and the Fourteenth Amendments have an independent vitality and are not merely collections of the specific guarantees contained in either of those amendments. In *Palko v. Connecticut*, 302 U.S. 319 (1937) and *Adamson v. California*, 332 U.S. 46 (1947), the Court had occasion to examine the meaning and significance of the due process clause in this regard, and in each of these decisions it pointed out that that clause requires procedure which is "the very essence of ordered liberty."¹⁰ Thus this clause which protects the "ultimate decency in a civilized society"¹¹ requires the Court to examine "the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."¹²

¹⁰*Palko v. Connecticut*, *supra*, at 325.

¹¹*Adamson v. California*, *supra*, at 61.

¹²*Adamson v. California*, *supra*, at 67-68.

Earlier Mr. Justice Cardozo had said that a state would violate the due process clause of the Fourteenth Amendment by an administration of criminal law which would offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". (*Snyder v. Massachusetts*, 291 U.S. 97, 105 [1934].)

Two of the judges of the Supreme Court, while dissenting in the *Adamson* case, recognized that:

“Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.”¹³

We submit that the facts of this case clearly bring it within these proscriptions. If canons of decency and justice do not require this Court to strike down this proceeding as a violation of due process irrespective of the technical considerations of double jeopardy, then the words quoted above lose all meaning. The Supreme Court has said:

“Our minds rebel against permitting the same sovereign to punish an accused twice for the same offense.” (*Louisiana v. Resweber*, 329 U.S. 459, 462 [1947].)

And speaking of those deep-rooted principles of justice adverted to by Mr. Justice Cardozo in the *Snyder* case, *supra*, Mr. Justice Frankfurter, concurring, said:

“A state may offend such a principle of justice by brutal subjection of an individual to successive retrials on a charge on which he has been acquitted. Such conduct by a state might be a denial of due process, but not because of the protec-

¹³*Adamson v. California*, *supra*, at 124.

tion against double jeopardy in a federal prosecution against which the Fifth Amendment safeguards limits a state.” (*Ibid.*, 329 U.S. at 469.)

Assuming that these fundamental principles of justice are a part of due process, then it is clear that this Court must reject what has been done to appellant Bridges here.

“If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense.” (*United States v. Chouteau*, 102 U. S. 246, 249 [1881].)

And this principle prohibits not merely a second punishment for the same offense, but likewise a second trial.¹⁴

But if technical obstacles to the application of double jeopardy or due process cannot be scaled, no such problem exists with respect to *res judicata*. For, as Mr. Justice Brandeis said for a unanimous Court:

“* * * The Fifth Amendment in protecting against double jeopardy was not intended to supplant the fundamental principle of *res judicata* in criminal cases * * *” (*Collins v. Loisel*, 262 U.S. 426, 430 [1923].)

¹⁴*Ex parte Lange*, 18 Wall. 163 (1874); *Short v. United States*, 91 F.2d 614 (4 Cir., 1937). These considerations have impelled even arbitrators under collective bargaining contracts to apply the doctrine of double jeopardy to cases involving discharges of employees for alleged misconduct. *In re International Harvester Company*, 16 L. A. 616 (McCoy, 1951).

III. APPELLANT BRIDGES WAS IMPROPERLY DEPRIVED OF THE ADVANTAGE OF THE DOCTRINE OF RES JUDICATA.

The effect of the prior administrative and judicial determinations in the earlier proceedings and their impact on the present case were raised by appellant Bridges at every stage of this proceeding where he could conceivably raise them.

He first moved to dismiss the proceeding on those grounds. (Tr. 11-15.) That motion was denied by the trial Court. (*United States v. Bridges*, 86 F.Supp. 922, 928 [N.D. Calif., 1949].) He then objected to the introduction of any evidence having to do with events which antedated the prior determinations and which therefore either were or could have been embraced within the scope of the prior proceedings. (Tr. 736, 816-817.) His objections were overruled. (*United States v. Bridges*, 87 F.Supp. 14 [N.D. Calif., 1949].) He sought to introduce into evidence the decision of the Supreme Court in *Bridges v. Wixon* and the finding of Dean Landis. (Tr. 525, 590-600.) The Government's objection to the introduction of that evidence was sustained. (Tr. 600.) He proposed a series of instructions which would have applied the doctrine of *res judicata* to this case and the trial Court refused to give such instructions. (Tr. 293-296.) And finally, the trial Court gave instructions in which it specifically advised the jury that no force or effect whatsoever was to be given to any of the prior proceedings. (Tr. 332, 7868.)

On all of the foregoing counts the trial Court committed grave error. It failed to apply the principles

of *res judicata* to the case at bar and in so doing, it seriously prejudiced appellant's position.

Perhaps the key case in any discussion of the doctrine of *res judicata* is *Southern Pacific Co. v. United States*, 168 U.S. 1 (1897), where the Court said:

“The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is *for a different cause of action*, the right, question, or *facts once so determined* must, as between the same parties or their privies, be taken as *conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and liberty of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.” (*Ibid.*, 168 U.S. at 48, 49.)

This principle is one which is applicable irrespective of the nature of the suit or the forum in which it is tried. The sense of this principle is simple: that parties are bound by the results of the litigation in

which they engage and that they may not relitigate the same questions of fact over and over again even though they may find a new forum or may cast their cause in a different form.

The principle enunciated in the *Southern Pacific* case, *supra*, was carried forward in *Frank v. Mangum*, 237 U.S. 309 (1915).

“It is a fundamental principle of jurisprudence arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1 * * * The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.” (*Ibid.*, 237 U.S. at 333, 334.)

In *United States v. Oppenheimer*, 242 U.S. 85 (1916), an indictment had been quashed because it was held to have been barred by the operation of the statute of limitations. Thereafter and in a subsequent case (the Government not having appealed in the case under consideration) it was held that a longer statutory period was applicable. The Government, within the period so determined, instituted a new proceeding. It was held that the dismissal in the first proceeding was *res judicata* as far as the second proceeding was concerned.

The significance of the case is that the Government there specifically contended that the doctrine of *res*

judicata did not apply to criminal cases. This contention was flatly rejected by the Court.

“Upon the merits the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt * * * We may adopt in its application to this case the statement of a judge of great experience in the criminal law: ‘Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it take the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense * * * In this respect the criminal law is in unison with that which prevails in civil proceedings.’ Hawkins, J., in *Reg. v. Miles*, L.R. 24 Q.B. Div. 423, 431 * * * The safeguard provided by the constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in civil law is a fundamental

principle of justice (*Jeter v. Hewitt*, 22 How. 352 * * *) in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.” (*Ibid.*, 242 U.S. at 87-88.)

In view of the basis for the principle, it is not surprising that the cases hold a determination in a criminal proceeding is *res judicata* in a civil case (*Coffey v. United States*, 116 U.S. 436 [1886]), a determination in an admiralty proceeding is *res judicata* in a civil action (*Gelston v. Hoyte*, 3 Wheat. 246 [1817]), a determination in an injunction suit is *res judicata* in an action for damages (*United States v. Munsingwear, Inc.*, 340 U.S. 36 [1950]); or a determination of an alien’s right to enter the country is *res judicata* in a deportation proceeding. (*Choy Yuen Chan v. United States*, 30 F.2d 516 [9 Cir., 1929].)¹⁵

The question is *what* has been determined, not what was the form of action in which the determination was made.

In *New Orleans v. Citizens Bank*, 167 U.S. 371 (1897), the Court said:

“The proposition that because a suit for a tax of one year is a different demand from a suit for a tax of another, therefore *res judicata* cannot

¹⁵Where this Court held that a decision of the Board of Special Inquiry determining the right of an alien to enter this country was *res judicata* in a subsequent deportation proceeding, saying: “* * * it was not the intention of the law that one who has once been admitted upon proof which satisfied the board of his right to admission should be called upon again and again to prove his right to be and remain in the United States * * *” (*Ibid.*, 30 F.2d at 517.)

apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting *from the thing adjudged* does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the textbooks and enforced by many decisions of this court.” (*Ibid.*, 167 U.S. at 396.)

And, as said in *Coffey v. United States*, 116 U.S. 436 (1886),

“* * * where an issue raised as to the existence of the *act* or *fact* denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, *the existence of the same act or fact* is the matter in issue, as a cause for the forfeiture of the property prosecuted in such a suit in rem.” (*Ibid.*, 116 U.S. at 443.)

It was urged in the *Coffey* case that the doctrine of *res judicata* ought not apply since the Government in a criminal case had the burden of proving guilt beyond a reasonable doubt, and that evidence which failed to satisfy that burden might very well satisfy the lesser civil law doctrine of a preponderance of proof. The Court rejected the argument, saying that

since the facts had been put in issue between the parties and had been determined adversely to the United States, the Government could not go behind that determination and relitigate a question of fact in a subsequent proceeding even though it was a proceeding of a different nature.

“This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, *criminal and civil, the United States is the party on the one side and this claimant the party on the other*. The judgment of acquittal in the criminal proceeding ascertained that the *facts* which were the basis of that proceeding and are the basis of this one, and *which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist*. This was ascertained *once for all*, between the United States and the claimant, in the criminal proceeding, so that the facts cannot again be litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts.” (*Ibid.*, 116 U.S. at 444.)

This doctrine was recently repeated by the Supreme Court in *Sealfon v. United States*, 332 U.S. 575, 578 (1948):

“* * * res judicata may be a defense in a second prosecution. The doctrine applies to criminal as well as civil proceedings * * * and operates to conclude those matters in issue which the verdict determined though the offenses be different.”¹⁶

¹⁶This case was cited with approval by the Supreme Court in *United States v. Williams*, U.S., 71 S.Ct. 595, 598, 95 L. ed. 502, 504 (1951). See also *United States v. De Angelo*, 138 F.2d 466 (3 Cir., 1943).

These principles have been applied to naturalization cases as well as to other types of cases.

It has repeatedly been held that a naturalization certificate issued by a Court of competent jurisdiction and valid on its face is conclusive whenever collaterally attacked as to all matters necessarily involved in the issue presented.¹⁷

In the much cited and quoted case of *Spratt v. Spratt*, 4 Pet. 393 (1830), Chief Justice Marshall said:

“The various acts upon the subject submit the decision of the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity.

“The inconvenience which might arise from this principle has been pressed upon the court; but the inconvenience might be still greater if the opposite opinion be established.” (*Ibid.*, 4 Pet. at 407-408.)

This Court so held in *United States v. Pandit*, 15 F.2d 285 (9 Cir., 1926), cert. den. 273 U.S. 759 (1927) where the Government brought an action to cancel a certificate of naturalization on the ground that the

¹⁷See the overwhelming citation of authorities in 6 A.L.R. 407.

defendant was a Hindu and consequently not a "free white person" within the meaning of the Naturalization Act, and consequently was not entitled to naturalization. The Court held squarely that the decree admitting him to citizenship was *res judicata* on the disputed question of *fact*. It pointed out that the Government had appeared in the naturalization proceeding, had objected to the naturalization of the defendant on the ground that he was not a "free white person", that that question of fact had been submitted to the naturalization Court and had been fully litigated, argued and briefed, and that the determination was now conclusive.

"The issue in the trial court was clearly an issue of fact. The defendant asserted a status, 'free white person,' within the meaning of the Naturalization Act. This status the court determined as a question of fact, in considering the evidence presented and after the issue was fully briefed and argued. The court erred in its conclusions. " "Erroneous" means deviating from the law. * * *

Courts often speak of erroneous rulings, and always mean such as deviate from or are contrary to the law, but the term "erroneous" is never used by courts of law writers as designating a corrupt or evil act.' *Thompson v. Doty*, 72 Ind. 336 at 338. It means having power to act, but error in its exercise. *Matter of N.Y. Catholic Protectory*, 8 Hun. (N.Y.) 91, 196. See, also, *Chemung Nat. Bank v. Elmira*, 53 N.Y. 609; *Tiedt v. Carstensen*, 61 Iowa 365, 16 N.W. 214.

"The question of *res judicata* was raised in *Johannessen v. United States*, 225 U.S. 227, 238, 32 S.Ct. 613, 615 (56 L.Ed. 1066). The court said:

‘The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court, 2 Black, Judgts., secs. 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48 [18 S.Ct. 18, 27, 42 L.Ed. 355], “that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.”’ And then it was said: ‘Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public.’

“The court in this decision recognized the doctrine of *res judicata*, except in *ex parte* cases, applicable to a naturalization hearing. In *Tutum v. United States*, *Neuberger v. United States*, 270 U.S. 568, at page 577, 46 S.Ct. at page 427 (70 L.Ed. 459) Justice Brandeis said: ‘In passing upon the application the court exercises judicial judgment.’ In *Mut. Benefit Life Ins. Co. v. Tisdale*, 91 U.S. 238, 245 (23 L.Ed. 314) the court said: ‘This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property.’

* * * * * *

“By the same token erroneously granting naturalization to the defendant, the right to citizenship having been distinctly put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, the judgment, not having been modified

or reversed, cannot now be disputed.” (*Ibid.*, 15 F.2d at 286-287.)¹⁶

Determinations by administrative tribunals possessing the power to subpoena witnesses and in which full litigation is had, have long been accorded the effect of *res judicata*. Of the many examples that may be cited, a few are here given: Determinations in favor of a claim of citizenship, made by a United States Commissioner in deportation proceedings (*United States v. Lew Ah Jung*, 224 F. 649 [D. Mass., 1915] *Leung Jun v. United States*, 171 F. 413 [2 Cir., 1909]); determinations in proceedings before the United States Patent Office (*In re Becker*, 74 F.2d 306 [C.C. P.A., 1935]; *Lavin v. Pierotti*, 129 F.2d 883 [C.C. P.A., 1942]); determinations in proceedings before the Board of Tax Appeals (*U.S. ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 [1937]; *Haller v. Commissioner*, 26 B.T.A. 395, 400-401) determinations in reparations proceedings before the Interstate Commerce Commission (*Arizona Grocery Co. v. A. T. & S. F. Ry.*, 284 U.S. 370 [1932]; *Arizona Wholesale Grocery v. S. P. Co.*, 68 F.2d 601 [9 Cir., 1934]); determinations in proceedings to establish priority rights in state waters (*Farm Investment Co. v. Carpenter*, 9 Wyo. 110 [1900]); determinations in proceedings under the Longshore and Harbor Workers Act (*Roths-*

¹⁶It has even been held that a collateral attack upon a certificate of naturalization may not be maintained even in a criminal proceeding. *United States v. Hamilton*, 157 F. 569 (C.C. N.Y., 1907):

“The order of the court, the accompanying affidavits, and the certificate of citizenship were regular in form, and, until vacated and set aside, cannot be attacked collaterally, even on a criminal charge.”

child v. Marshall, 44 F.2d 546 [9 Cir., 1930]); determinations in proceedings under a State Workmen's Compensation Act (*Trigg v. Industrial Commission*, 364 Ill. 581 [1936]); determinations by a civil service commission (*Heap v. City of Los Angeles*, 6 Cal.2d 405 [1936]); determination by an agricultural pro-rate commission (*Olive etc. Committee v. Agricultural etc. Commission*, 17 Cal.2d 204 [1941]).

The true test is the character of the proceeding.

The determinations in the deportation cases were not legislative acts of general application operating in the future. They were decisions made final by statute (*United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 [1923]), rendered in specific cases and based upon findings supported by evidence of past events introduced at full hearings at which each party had his day in Court—contested hearings at which witnesses were compelled by subpoena to attend and in which they were sworn, examined and cross-examined. These are the characteristic elements which, when present in administrative proceedings, make the adjudication as solemn as the judgment of the Court, and hence subject to the usual rules of estoppel (*Butterworth v. United States*, 112 U.S. 50 [1884]; *Cardinal Bus Lines v. Consolidated Coach Corp.*, 254 Ky. 586 [1934]; *United States v. Pandit*, *supra*.)

If the adjudication in the first deportation hearing had not served to create an estoppel, there would have been no occasion to contend that the private bill passed in 1940 by the House of Representatives to secure Bridges' deportation was a breach of faith.

Yet this is precisely the point made by Mr. Justice, then Attorney-General, Jackson:

“This same alien has been accused, investigated, and tried at great length and judgment has been rendered that he has not been proved guilty of the charges made against him. By this bill the United States would deny faith and credit to its own duly conducted legal proceedings.” (Department of Justice Release, June 18, 1940.)

It is surely no less a denial of faith and credit to both adjudications that their disregard is now being sought by a judicial rather than a legislative act. Having been fully litigated (twice now), the case was entitled to remain closed.

The issue of fact litigated in the deportation proceedings was whether or not appellant was or had been, since his entry into the United States, a member of the Communist Party. In those proceedings this issue of fact was determined in favor of Bridges and adversely to the Government. As the authorities cited above indicate, the fact that the form of the proceedings has now changed does not make the determination of fact any the less binding upon the parties. In any proceeding between the parties and their privies the factual determination that Bridges is not and has not been since his entry into the United States a member of the Communist Party, is conclusive. It has been determined by tribunals of competent jurisdiction and cannot now be inquired into.

To hold that determinations made in deportation proceedings are not *res judicata* is to hold that the

Government, should it be so determined, may constantly retry the question of deportation in new proceedings, or retry the issues litigated in the deportation proceedings in a different forum. This means that the Government cannot possibly be defeated since it need not abide by any decision against it, and that only the incarceration, denaturalization and deportation of appellant Bridges or his ultimate bankruptcy, are final.

The trial Court committed clear error in failing to apply the principles of *res judicata* and for that reason its judgment must be reversed.

POINT III.

THE FIRST AND SECOND COUNTS OF THE INDICTMENT FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES.

(Specification of Errors 4, 5, 6, 19, 20.)

The first count of the indictment alleges that appellants conspired to have appellant Bridges falsely and fraudulently represent to the Superior Court that Bridges had never belonged to the Communist Party whereas in truth and in fact he had, and that "said statement and representation were material to said naturalization proceeding."

The second count of the indictment quotes the question put to, and the answer given by, appellant Bridges in this regard, and alleges that by so answering appellant Bridges "did then and there willfully and knowingly make a false statement under oath in

certain matters which were material to the issues in said proceedings.’’

Materiality, therefore, is an essential ingredient of the offenses charged in both the first and second counts of the indictment.

An analysis of the law which obtained in the summer and fall of 1945 at the time the acts alleged in the first and second counts of the indictment were committed, demonstrates that the statement and representation alleged to have been made in the naturalization proceeding was not a material matter in that proceeding.

The fact that the indictment alleges that this statement and representation was “material” is of no consequence since such an allegation is only the conclusion of the pleader. The question of materiality is a question of law for the Court to determine and it is not precluded from making that determination by the language used in the indictment.

“If the matter or facts stated in the indictment as sworn to appear to the court not to be material, notwithstanding they are alleged so to be in the indictment, they will not be sufficient to support it.” (*United States v. Rhodes*, 212 F. 518, 519 [D.C. Ala., 1913].)

In a leading case in this circuit, *Luse v. United States*, 49 F.2d 241 (9 Cir., 1931), it is said:

“It is unquestionably true that the materiality of the evidence adduced upon the former trial was a question to be determined by the trial judge.

This was a question of law, but in a charge of perjury the question of materiality of the evidence adduced upon the former trial is necessarily a mixed question of law and fact. That is, it is not an abstract question of law, but depends upon what occurred at the former trial. Materiality depends primarily upon the issues involved in the former trial and upon the evidence adduced in support of these issues. What the evidence was, and what the pleadings were upon that trial, is a question of fact. Whether the testimony alleged to be perjured was material to such issues is a question of law.” (*Ibid.*, 49 F.2d at 245.)

Since the Court must determine as a matter of law whether the alleged false statement was material, it is necessary to consider briefly what is meant by a material matter.

“It is a general rule, supported by an even current of all the authorities, that to constitute perjury the statement alleged to be false must relate to a matter material to the issue, and that the same rule applies where the alleged false statement was produced before the grand jury. A statement upon which perjury may be assigned must have the following legal characteristics: (1) it must be competent testimony; (2) it must be material and relevant *to the issue*; (3) it must be a declaration of fact and not a conclusion of the witness; (4) it must be such that it would *properly influence* the tribunal before which it is made, in its determination of the issue under investigation; (5) it must be false; (6) its falsity must be known to the witness when made, and must be willfully and deliberately deposed

to.” (I *Wharton’s Criminal Evidence* [10th ed. 271-272].)¹

On the same subject it has been said in this circuit: “* * * ‘Materiality’ is a word to be measured by the surrounding circumstances. The materiality of the testimony should be determined *as of the time the testimony was given and by the matters then under investigation.*” (*Newman v. United States*, 58 F. (2d) 751, 754 [9 Cir., 1932].)

In *United States v. Cameron*, 282 F. 684 (D.C. Ariz., 1922), the Court said:

“It is to be observed that under the definition it is not sufficient to constitute the offense that the oath shall be merely false, but that it must be false in some ‘material matter’. Applying that definition to the facts stated in either count of this indictment, and it would seem that there is an entire lack in any essential sense to disclose that the particulars as to which the oath is alleged to have been false were material in the essential sense required for the purposes of an indictment for this offense.” (*Ibid.*, 282 F. at 692.)

What was being considered by the Superior Court on September 17, 1945, was a naturalization proceeding. In order to determine whether the alleged false statements and representations went to a matter then and there material to such a proceeding, it is necessary to consider the naturalization law as it then ex-

¹See also *ibid.* (11th ed.), 588-589.

isted. Only in that way is it possible to determine whether or not the questions put to appellant Bridges and upon which this entire prosecution is based, had any materiality.

The Nationality Code as it existed on September 17, 1945, provided that no person could be naturalized who advised, advocated or taught "opposition to all organized government", or "the overthrow by force or violence of the Government of the United States", or who wrote or published or caused to be written or published, literature to the same effect. (8 U.S.C.A. 705, 8 U.S.C. 732[a] [16].) It is not alleged in either Court One or Court Two of the indictment that the Nationality Code as it existed on September 17, 1945, precluded naturalization because of membership in the Communist Party. Therefore, the indictment lacks factual allegations to establish that the question was material.

As a matter of fact, only two years before these Superior Court proceedings, the Supreme Court of the United States had indicated that Communist Party membership was immaterial in a naturalization proceeding:

"The Nationality Act of 1940 * * * does not in terms make Communist beliefs or affiliations ground for refusal of naturalization." (*Schneiderman v. United States*, 320 U.S. 118, 132, note 8 [1943].)

Furthermore, it is significant that a question was put to appellant Bridges and answered by him which was material on September 17, 1945:

“Q. Do you now or have you ever belonged to any organization that advocated the overthrow of the government by force and violence?

A. No.” (Tr. 138.)

Thus it appears that the Government had asked and had received an answer to the ultimate question which was material under the statutes and under the cases. Any other questions that it asked, therefore, were not and could not have been material.

It is also significant that the indictment did not charge that the answer given to the question just quoted (which immediately preceded the question set forth in Count Two of the indictment), was false. In other words, the government in effect concedes that appellant Bridges did not, at the time of his naturalization, belong to any organization which advocated the overthrow of the government by force and violence. In effect, therefore, the government concedes that appellant Bridges was properly naturalized since, as we have indicated, the statute did not proscribe naturalization for membership in the Communist Party but only for membership in an organization advocating the overthrow of the government by force and violence.²

²The decision in *Dennis v. United States*, U.S., 71 S. Ct. 857, L. ed. (1951), is plainly immaterial. Aside from the fact that that prosecution originated under the Smith Act (18 U.S.C. [1946 ed.] 11) and is therefore a precedent of dubious value in this case, is the fact that the materiality of the question quoted in the second count of the indictment and referred to in the first, must be determined, as the foregoing authorities show, by a consideration of the statutes and the case law as it existed at the time the question was asked and answered, and a subsequent decision of the Court could not be deemed to impart materiality to a question which was immaterial at the time it was asked and answered.

POINT IV.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANTS OR ANY OF THEM FOR THE OFFENSE CHARGED IN THE FIRST COUNT OF THE INDICTMENT.

(Specification of Error 20.)

Although the first count of the indictment charges the crime of conspiracy, there was no direct evidence that appellants entered into a conspiracy.

The trial Court in fact so charged the jury:

“I instruct you that there has been no direct evidence presented in this courtroom that the defendants or any of them met together or agreed or conspired with each other or with any other persons to defraud the United States Government in any manner as alleged in the first count of the indictment.” (Tr. 7900.)

Nor was there any circumstantial evidence from which the jury could reasonably infer that appellants or any of them had agreed or conspired with each other or with any other person to defraud the United States Government in any manner as alleged in the first count of the indictment.

The first count of the indictment charges that appellants:

[a] “* * * did conspire with each other and with divers other persons to the grand jury unknown to defraud the United States by impairing, obstructing, and defeating the proper administration of its naturalization laws in the manner following to-wit:”

[b] “* * * by having said defendant, Harry Renton Bridges, fraudulently petition for and

obtain naturalization in a naturalization proceeding in the Superior Court of the State of California in and for the City and County of San Francisco,”

[c] “* * * by falsely and fraudulently stating and representing to the said court in said proceeding numbered 28152 in the records of said Superior Court that he, said defendant Harry Renton Bridges, had never belonged to the Communist Party in the United States.”

This is an interesting and unusual form of pleading in that the basic allegation is the third [c] to be stated and in that the allegations which precede it are no more than conclusions concerning the legal effect of the basic allegation.¹

The basic allegation [c] is that appellants conspired to have Bridges state and represent to the Superior Court that he had never belonged to the Communist Party in the United States. Upon this allegation is superimposed the allegation [b] that “by” so conspiring appellants conspired to have Bridges “fraudulently petition for and obtain naturalization”; and upon this allegation in turn is superimposed the allegation [a] that “by” so conspiring appellants conspired “to defraud the United States by impairing, obstructing and defeating the proper administration of its naturalization laws”. In other words, it is not

¹The Government undoubtedly cast the indictment in this form in an effort—an unsuccessful effort, it has been shown (see *supra*)—to avoid the limitations problem which would have been directly and obviously presented by a simple perjury or conspiracy to commit perjury indictment. See Norberg, *The Wartime Suspension of Limitations Act*, 3 Stanford Law Rev. 440, 445-446, where such pleading is referred to as a “procedural gimmick”.

charged that appellants conspired to defraud the United States or conspired to have Bridges fraudulently petition for and obtain naturalization *in any way other* than by having Bridges state and represent to the Superior Court that he had never belonged to the Communist Party.

Thus the heart of the conspiracy alleged in the first count of the indictment is an agreement by appellants to have *Bridges* make false representations to *the Superior Court* hearing his naturalization petition.

The first count specifies the time for the formation and duration of this conspiracy as follows:

“* * * on or about the 23rd day of June, 1945 and continuing thereafter until on or about October 1, 1945, and for some time prior thereto the exact time being to the grand jury unknown * * *”
(Tr. 4.)

The date of June 23, 1945, is repeated in the first overt act alleged as the date upon which Bridges filed with the Immigration and Naturalization Service his “Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization”.
(Tr. 5.)

The application so filed by Bridges was received in evidence as United States Exhibit 1. (Tr. 449-469.)² An examination of that document reveals that nowhere therein did Bridges state or represent that he had never belonged to the Communist Party in the

²This document is printed in the Transcript of Record in full as an exhibit to Bridges’ affidavit in support of his motion to dismiss. (Tr. 102-125.)

United States and that nowhere therein did any interrogatory call for the making of such a statement or representation. As a matter of fact, the evidence shows that far from misrepresenting any facts on this application, Bridges answered one of the questions in detail as follows:

The 30th numbered interrogatory reads:

“Have you ever been arrested or charged with violation of any law of the United States or state or any city ordinance or traffic regulation? * * * If so, give full particulars.” (Tr. 108.)

The answer to this interrogatory was “Yes” and “See attached page paragraph (6).” (Tr. 108.) On the attached page in “paragraph (6)” the following statement was made:

“In 1938 I was arrested in Baltimore, Maryland, on a charge of being subject to deportation. My case was tried in 1939 at Angel Island before Dean James M. Landis. He found and held that the charges against me were untrue and recommended that the warrant of arrest be cancelled. The Secretary of Labor accepted this recommendation, and ordered the proceedings dismissed and the warrant of arrest cancelled. In 1941 I was again arrested in San Francisco under a warrant charging me with being subject to deportation. I was tried before Judge Charles Sears whose adverse recommendations were rejected by the United States Board of Immigration Appeals. This Board found that the charges against me were untrue and that they should be dismissed. However, Attorney General Biddle overruled the Board’s decision. I brought habeas

corpus proceedings in the federal court and these proceedings have just been terminated with a decision of the United States Supreme Court on June 18, 1945, reversing the lower court because it had refused to hold my deportation invalid and granting a writ of habeas corpus." (Tr. 121-122.)

Bridges' application itself (U.S. Ex. 1) thus shows that up until five days prior to its filing by him on June 23, 1945, there was outstanding against him a warrant of deportation based upon his alleged membership in or affiliation with the Communist Party. Since this warrant of deportation was both a practical and a legal bar to Bridges' naturalization,³ it follows that no conspiracy to defraud the government by petitioning for and obtaining naturalization as charged in the first count of the indictment could have been entered into while that warrant was pending. As said by Chief Judge Learned Hand:

"* * * men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all the elements which constitute a crime." (*United States v. Penn.*, 131 F. (2d) 1021 [2 Cir., 1942].)

In this case appellants could not have united in a purpose to bring to pass the naturalization of Bridges by fraudulent means—or any other means—so long as the warrant of deportation was pending against Bridges. In other words, there could not have been a conspiracy prior to June 18, 1945, for until that day,

³Cf. 8 U.S.C.A. 137, 705.

while the warrant was still pending, the naturalization of Bridges was both practically and legally impossible.

The only witness, other than appellants, who testified concerning any act or statement of any of the three appellants subsequent to June 18, 1945, was Lloyd H. Garner, a naturalization examiner.

Many other witnesses gave testimony in an attempt by the government to prove that appellants were members of the Communist Party for some years prior to 1945. Such evidence, however, had no tendency to prove that appellants conspired in the spring and summer of 1945 as charged in the first count of the indictment.

Garner's testimony of the events subsequent to June 18, 1945, was that he saw appellants on only three occasions (Tr. 447): (1) on June 23, 1945, when Bridges filed his application (Tr. 447-450); (2) on August 8, 1945, when Bridges and his witnesses appeared in the office of the County Clerk (Tr. 451); and (3) on September 17, 1945, when Bridges' petition for naturalization came on for hearing in the Superior Court. (Tr. 465-466.) Garner saw appellants Schmidt and Robertson on the latter two occasions only. (Tr. 447-449.)

Garner did not testify to having had any conversation with Bridges on the first of these occasions, June 23, 1945; but only to having received from him the application. (Tr. 450.) As we have already pointed out, there is no statement or representation in that application by Bridges, and no interrogatory is

contained therein which calls for any statement or representation, concerning membership in the Communist Party. Thus there is no evidence either direct or circumstantial that a conspiracy as charged was entered into or was being carried out on June 23, 1945.

Concerning his interview with Bridges on August 8, 1945, Garner testified on direct examination as follows:

“Q. * * * Would you tell us exactly what you did, what you characterize as conducting a preliminary examination?

A. With the application before me, I called Mr. Bridges, the applicant, into my presence in the examination room, swore him to tell the truth in connection with the proceeding, and undertook then to verify the information as it is set down in the application.

Q. And how do you go about doing that?

A. I did that by reading the questions that appear on the application and asking for his responses. *And the responses as he gave them were checked against the questions asked on the application form.*

Q. *And those, what appear to be penciled check marks against each question, were they put there by you and at that time?*

A. *They were put there by me at the time I asked the questions, yes, sir.*

Q. Is there anything on that application, Mr. Garner, which would indicate by whom that application was prepared?

A. On page 2 of the application, question No. 35, ‘Did you yourself fill out this form?’ The typewritten answer is ‘Yes’, and the document is signed ‘Harry Renton Bridges’.

Q. Now, after having checked Mr. Bridges' answers as you have indicated, what did you further do?

A. After I had completed the examination of Mr. Bridges, then I called for his two witnesses. I asked him to leave the examination room and the witnesses or persons whom he offered as witnesses in his behalf came into my presence in the room." (Tr. 451-452.)

Thus it appears that Garner did not, on August 8, 1945, ask Bridges about membership in the Communist Party and that Bridges did not on that occasion make any statement or representation on the subject.

Garner further testified that after he completed the examination of Bridges and his witnesses (we will discuss the examination of the witnesses below), he handed the petition for naturalization in triplicate form, together with the original application, to the Deputy Clerk of the Court to have the petition typed for signing and that he, Garner, then departed. (Tr. 465.)

This petition for naturalization as filled in, signed and filed later in the day of August 8, 1945, was received in evidence as United States Exhibit 2. (Tr. 469.)⁴ An examination of the petition discloses that nowhere therein did Bridges make any statement or representation about membership in the Communist Party and that nowhere therein did any interrogatory

⁴This document is printed in the Transcript of Record in full as an exhibit to Bridges' affidavit in support of his motion to dismiss. (Tr. 125-133.)

call for the making of any statement or representation on that subject. Thus, as far as Bridges is concerned there is no evidence that a conspiracy as charged was entered into or was being carried out on August 8, 1945.

While Garner testified concerning what was said and done at the Court hearing on September 17, 1945, the transcript of that proceeding received in evidence as United States Exhibit 3 (Tr. 480) is more complete and more accurate.⁵ The transcript reveals that appellants Schmidt and Robertson were first examined by Garner; that after their examination Garner stated to the Court: "These witnesses are satisfactory, your Honor"; that both the clerk of the Court and the judge of the Court informed the witnesses that they might leave; and that thereafter Garner examined Bridges. (Tr. 134-135.) The transcript further reveals that at no time during the hearing did either his witnesses or Bridges volunteer any statement or representation that Bridges had never belonged to the Communist Party, but that such statement or representation as Bridges (alone) made on the subject was made in response to the question asked of him by Garner (who was then acting on behalf of the government and not as counsel for Bridges).

Concerning the hearing of September 17, 1945, Garner testified that he had not been directed to make any objection to Bridges' petition for naturalization (Tr. 479, 504), but on the contrary he had been in-

⁵The transcript of the Superior Court proceeding is printed in full in the Transcript of Record as an exhibit to Bridges' affidavit in support of his motion to dismiss. (Tr. 134-145.)

structed by his immediate superior not to make any objection. (Tr. 532.) He further testified that at the hearing he asked Bridges all the questions which occurred to his mind to be proper at that time. (Tr. 503.)

The record indicates that a fortuitous circumstance which was brought to his attention on the morning of the Court hearing prompted Garner to ask Bridges two additional questions: one, about Communist Party membership, and another about whether Bridges had ever used a different name. This circumstance was that on Friday, September 14, 1945, there was received at the office of the Immigration and Naturalization Service in San Francisco an affidavit of Bridges' then-wife (from whom Bridges was at that time in the process of obtaining a divorce) wherein it was alleged that Bridges was a member of the Communist Party under the name of Dorgan. (Tr. 138-144, 514.) The following indicates that Garner's questions about membership in the Communist Party and the use of another name were prompted by this fortuitous circumstance:

"Mr. Garner. If the Court please, I have no further evidence. I have an affidavit which was received by the Department on Friday of last week. I have had no opportunity to make any investigation of it. I merely offer it for what it is worth (handing to Court).

The Court. This is an affidavit of Agnes Bridges. Is that Mrs. Bridges?

The Witness. My wife, yes, sir.

Mr. Garner. It contains certain statements there that——

The Court. Well, I think this—I don't think that this affidavit can be used as substantive evidence.

Mr. Garner. I am not offering it as evidence.

The Court. But, however, the information in it can be used as a basis for questioning the Petitioner, if you see fit to.

Mr. Garner. It sets out there that he has been known under another name. I have asked him and he has denied it." (Tr. 139.)

From the foregoing it affirmatively appears that at no time between June 18, 1945, and September 17, 1945,⁶ did Bridges volunteer the statement or representation that he had never belonged to the Communist Party in the United States and that the only statement or representation made by him on that subject between such dates was not made pursuant to or in furtherance of any conspiracy but was made solely because Garner asked a question which called for a statement or representation on the subject. It is unmistakably evident that had Garner not asked the question, the entire naturalization proceeding would have terminated with Bridges' naturalization without Bridges at any time having made any statement or representation on the subject. Thus, had the question not been asked, it would have positively appeared that either one of two things were so: the conspiracy charged had never been formed; or if formed, it had been voluntarily abandoned without any attempt having been made to carry it into execution. In either

⁶The indictment alleges the conspiracy continued until October 1, 1945. There is no evidence of any acts committed or statements made after September 17, 1945.

event, there would have been no criminal liability on the part of any of the appellants.⁷

The mere fact that Garner happened to ask the question and that Bridges answered it as he did does not even tend to show that a conspiracy as charged had been formed. Moreover, as Bridges at no time volunteered any statement or representation concerning membership in the Communist Party, it affirmatively appears that if a conspiracy as charged had ever been formed, it was voluntarily abandoned before Garner asked the question which brought forth the one and only statement or representation made by Bridges on the subject.

To put this another way: Either the appellants had conspired as charged in the first count of the indictment prior to the asking of that question by Garner, or they had not. The fact that Garner asked the question and that Bridges answered it as he did could neither bring into being a conspiracy which had not theretofore existed; nor could it revive a conspiracy

⁷This Court's decision in *United States v. Marino*, 91 F.2d 691 (9 Cir., 1937), recognizes that a conspiracy, in which an overt act in furtherance thereof is necessary to complete the offense, may be abandoned before the doing of such an overt act, and the parties are thereby relieved of criminal responsibility. Where the common purpose is to accomplish a lawful end by lawful means, there is no conspiracy. To obtain naturalization is a lawful end. If there was any conspiracy in this case, it was not to obtain the naturalization, *but to use unlawful means in obtaining it*. The overt act, therefore, would have to be in furtherance of the use of unlawful means. No such overt act was proved. *Buhler v. United States*, 33 F.2d 382 (9 Cir., 1929), and *Eldridge v. United States*, 62 F.2d 449 (10 Cir., 1932), recognize that the abandonment of a conspiracy may be established by circumstances wholly inconsistent with the continuation of the conspiracy.

which if it had theretofore existed, had been voluntarily abandoned. If no conspiracy existed, the fact that Garner asked and Bridges answered a question could not serve to create a conspiracy between Bridges, Robertson and Schmidt. If there had been a conspiracy but it had been abandoned before Garner asked his question, then the answering of the question—e.g., the unilateral act of one of the former members of the conspiracy—could not revive it; a new understanding or agreement would be necessary to revive such an abandoned conspiracy.

We have said above that it appears from the record either that the conspiracy charged had never been formed or that having been formed, it was voluntarily abandoned without any attempt having been made to carry it into execution. We do not mean to admit or suggest that there is in the record any evidence from which it can reasonably be inferred that such a conspiracy was ever formed. On the contrary, we contend not only that there is no such evidence, but that all of the circumstances as revealed by the evidence indicate in an affirmative way that such a conspiracy was never formed.

One such circumstance is the fact that for a period of eleven years, that is from 1934 to 1945, Bridges had been actively and vigorously defending himself against the charge that he was or had been a member of, or was or had been affiliated with, the Communist Party. From this circumstance it was naturally to be assumed that Bridges would continue to defend himself against such a charge whenever, wherever,

and however it came or happened to be raised or revived, and that he would do so without the urging of any other person. It was also naturally to be assumed from this circumstance that Bridges would not, either by himself or in collaboration with others, raise or revive that charge and thus put himself to the task and hazard of again refuting it. Thus it was naturally to be assumed that Bridges would not, either by himself or in collaboration with others, inject into the naturalization proceeding the issue concerning Communist Party membership, but on the contrary that he would hope and desire that such issue would not be injected into that proceeding by any other person.

These inferences are supported by what Bridges did and did not do in connection with the naturalization proceeding. First, at no time did he himself raise the issue. Second, in answering the thirtieth interrogatory of his application he mentioned his two arrests on warrants of deportation to avoid the charge that he was concealing those arrests, and he mentioned the outcome of the proceedings following those arrests; but he did these things without mentioning that in each instance the charges which he had been called upon to refute had to do with alleged membership in the Communist Party. Third, when without any prompting from Bridges, Garner in open Court asked him the direct question, Bridges continued to defend himself as for years he had been defending himself against the charge by making the same denials which he had

previously and consistently made, and did so without hesitation or consultation.

Another circumstance which indicates that a conspiracy as charged was never formed is this: The decision of the Supreme Court in *Bridges v. Wixon*, *supra*, and particularly the excoriation by Mr. Justice Murphy of the Immigration and Naturalization Service, made it quite unlikely that shortly thereafter that service would again raise the question of whether Bridges was or had been a member of the Communist Party. It may be assumed that Bridges, Schmidt and Robertson severally would and did believe that the question had finally been put to rest and that no attempt would be made, particularly by a representative of the Immigration and Naturalization Service, to raise that question in the naturalization proceedings.⁸

So far we have not considered the testimony of Garner insofar as it relates to Robertson and Schmidt. as there is no *direct* evidence of a conspiracy, and as the charge was that appellants conspired to have *Bridges* state and represent that he had not been

⁸In this respect appellant Schmidt testified:

“* * * I had read the decision of the Supreme Court and I thought, well, as long as the highest tribunal in the United States of America has made a decision with respect to this case, the matter is now settled for all time.” (Tr. 4225-4226.)

And appellant Robertson also testified:

“And finally, a decision of the U.S. Supreme Court came out. I studied that decision. I studied the majority decision and I studied the concurring decision, and I made up my mind then and there that President Bridges was not, had never been, and was never affiliated with the Communist Party; and the Supreme Court of the United States is something that I think speaks with authority.” (Tr. 4617.)

a member of the Communist Party, and as Bridges did not volunteer any such statement or representation, Garner's testimony concerning the statements made by appellants Schmidt and Robertson would seem to be irrelevant and immaterial insofar as the conspiracy as charged is concerned. However, because we anticipate that the Government will attempt to find some indication of the existence of the conspiracy as charged in Garner's testimony concerning the statements made by appellants Schmidt and Robertson, we proceed to examine that testimony.

First we note that the application filed by Bridges on June 23, 1945 (U.S. Ex. 1), named as Bridges' two witnesses *Paul Schnur* and Henry Schmidt. (Tr. 114.) Neither of these men nor appellant Robertson was examined or made any relevant statements on June 23, 1945.

Of the examination on August 8, 1945, Garner testified as follows:⁹

"After I had completed the examination of Mr. Bridges, then I called for his two witnesses. I asked him to leave the examination room and the witnesses or persons whom he offered as witnesses

⁹This testimony was all immaterial for the reason indicated above.

It will be noted that with respect to the events of August 8, 1945, the indictment (Tr. 5) alleges that *Bridges* "*gave testimony*" in the matter of the naturalization application and that Schmidt and Robertson "*signed as witnesses*" the naturalization petition. It is not charged that the giving of testimony by Schmidt and Robertson was an overt act in furtherance of the conspiracy.

in his behalf came into my presence in the room.” (Tr. 452.)

Garner testified that he “was alone with each of the men respectively” (Tr. 489); that is, he and Bridges were alone when he questioned Bridges; he and Schmidt were alone when he questioned Schmidt; and he and Schnur were alone when he questioned Schnur. Garner further testified that he first examined Bridges, then Schmidt, then Schnur; that he rejected Schnur as a witness because he did not have with him satisfactory proof of his claim to derivative citizenship (Tr. 459-462); that he then “stepped to the door of the hearing room where Mr. Bridges and his attorney and other members of his party were waiting outside, called Mr. Gladstein, his attorney, and explained the situation to him that the case was going over to another day or if possible he could substitute a witness who was qualified” (Tr. 462); that “after a conversation outside of my presence he [Mr. Gladstein] returned with Mr. Robertson and said that he thought that Mr. Robertson could qualify, being a native-born citizen” (Tr. 463). That the conversation outside the presence of Garner was of short duration is indicated by the previous statement of this witness that “* * * after I started the examination of Mr. Schnur and disqualified him, I called for another witness and Mr. Robertson came in” (Tr. 461) “immediately” (Tr. 462).

These events which happened spontaneously on August 8, 1945, clearly negative the formation or existence of a conspiracy as charged in the indictment.

Both the petition for naturalization (U.S. Ex. 2) and the affidavit of witnesses annexed thereto (Tr. 130-131) follow a set form designed to elicit the information and declarations required by the naturalization statute. Before the petition itself or the affidavit of witnesses is typed the examiner separately swears and questions the applicant and his witnesses to ascertain whether each has the qualifications required by the statute. If the applicant and his witnesses are so qualified, the petition and the annexed affidavit are typed in triplicate. The typed petition is then signed under oath by the applicant and the annexed affidavit is signed under oath by the witnesses. These oaths are administered not by the examiner but by the clerk of the Court in which the petition is to be filed. This was the procedure followed in this case. (Tr. 464-465.)

Before considering Garner's testimony concerning his interviews with Schmidt and Robertson, it is well to remember that he had already testified that in his examination of Bridges on August 8, 1945, he merely followed the form and checked with Bridges to ascertain whether the answers to the questions on the form were correct. At no time did he go outside of any of the questions propounded on the form in his examination of Bridges, the chief figure in this proceeding. It must further be noted that the form of "Affidavit of Witnesses" used on August 8, 1945, by Garner when he questioned Schmidt and Robertson did not call for any declaration as to whether they were or had been members of the Communist Party

or as to whether Bridges was or had been a member of the Communist Party.¹⁰

Garner testified that in questioning Schmidt on August 8, 1945:

“I asked him under what circumstances he usually saw the applicant, whether in business or socially. He replied in business, that they were both officers or officials of the same union, the ILWU. I then asked him whether he was a Communist or a member of the Communist Party. He said he was not * * * I asked him whether the applicant was a member of the Communist Party and he answered negatively at that time.” (Tr. 457.)

Garner further testified that in questioning Robertson on the same occasion:

“* * * I asked him in what connection he usually saw the applicant, whether business or socially, and he said that they were both officers of the same organization, the union, ILWU. He saw him in connection with his work there. I asked him then whether he was a member of the Com-

¹⁰In this connection Garner testified that his purpose in asking questions of Schmidt and Robertson was to “fulfill the duties imposed upon me by law as a naturalization examiner to test the qualifications of the applicant and the witnesses in a naturalization proceeding”. (Tr. 464-465.) He did not at any time indicate that he had an intention or desire to go outside of, or beyond the scope of, such duties. It must also be noted that a bald question as to Communist Party membership would probably not have been asked in view of *Schneiderman v. United States*, 320 U.S. 118 (1943), which had held only two years before this interview of August 8, 1945, that membership in the Communist Party was not grounds for revoking (and, by clear inference, see 320 U.S. at 132, n. 8, denying) naturalization. Garner was required to, and did, keep himself abreast of Court decisions affecting his work as a naturalization examiner. (Tr. 464, 523ff, and cf. 559-560.)

munist Party and he said he was not. I asked him whether the applicant, Mr. Bridges, was a member of the Communist Party and he said he was not." (Tr. 463.)

At the time of his examination of both Schmidt and Robertson, Garner made certain notations. (Tr. 488.) One of these notations had to do with the fact that "both witnesses are members of the same union, the ILWU." (Tr. 489.) The other read "Your recommendation: Investigate loyalty and attachment to Constitution and police report." (Tr. 491.) There was no notation concerning any questions or answers with respect to the membership of anyone in the Communist Party. (Tr. 488-489.) Such notations as there were, were the only memorial of what was said at the time. (Tr. 488.) Garner testified that he did not recall having had any discussion about the Bridges matter after September 17, 1945, until three and one-half years after these events, "I think about the spring of 1949." (Tr. 540.)

Garner's testimony concerning statements purportedly made to him by Schmidt and Robertson respecting Communist Party membership of either themselves or Bridges is, if material, of no probative value. In connection with Bridges, Garner admits that he carefully followed the form. No reason is advanced why he should have departed from and gone beyond the form insofar as the two witnesses were concerned. No reason is advanced why, since he was making notations on other matters, he would not have made a notation on the matter of Communist

Party membership had it in fact been discussed. The absence of such a notation on the very document which Garner himself used is highly persuasive that there was no such discussion. Nor can Garner's testimony be accepted as an independent recollection of what transpired at a date approximately five years prior to the time of his testimony.

Appellant Schmidt testified that he had no recollection of any person connected with the Immigration and Naturalization Service asking him whether he or Bridges were members of the Communist Party. (Tr. 4220.)

Appellant Robertson in effect denied that on August 8, 1945, Garner had asked him whether he or Bridges were members of the Communist Party when, in testifying as to what occurred on that occasion, he said:

"Well, I was called in and, I guess I sat down. I don't recall all the details. And I was presented as one of those who was going to be a character witness for Mr. Bridges, and I was asked the routine questions: my name, my place of origin, am I a citizen of the United States, 'how long have you known Mr. Bridges?' and I told how long I had known him. I think I said ten years or so, I don't recall exactly what answer I gave and 'Is he a man of good moral character?' I said 'Yes, he is.'

" 'And is he a man that you would recommend for citizenship?' And I said 'I most certainly would.' *That's the gist of what happened there.*" (Tr. 4609.)

Disregarding the inherent weakness and lack of credibility of Garner's testimony about having on August 8, 1945, asked Schmidt and Robertson whether they and Bridges were members of the Communist Party, and assuming for the moment that such questions were asked and answered as testified to by Garner, we now consider whether such evidence constitutes proof that the conspiracy charged in the first count of the indictment ever existed.

It goes without saying that the facts testified to by Garner, all of which related to his examination of Schmidt and Robertson on August 8, 1945, could not prove and had no tendency to prove that a conspiracy as charged was formed at any time subsequent to August 8, 1945. This is so first, because there is no direct evidence that such a conspiracy was later formed; and second, because there is no evidence of any voluntary act by any of the appellants after that date which in connection with Garner's testimony as to the events of that date indicates even circumstantially that such a conspiracy was ever formed. It also goes without saying that inasmuch as Garner's examination of each of the appellants was held out of the presence of the others and in rapid succession, the facts testified to by Garner had no tendency to prove that a conspiracy as charged was formed during the time, on August 8, 1945, when Garner was examining Schmidt and Robertson.¹¹ This leaves only the question: Do the facts testified to by Garner have

¹¹In this regard, the significance of the last minute substitution of Robertson for Schnur (see *supra*) cannot be overlooked.

any tendency to prove that a conspiracy as charged was formed prior to, and was in existence at the time of, the examination of Schmidt and Robertson by Garner on August 8, 1945?

Had Schmidt and Robertson on August 8, 1945, volunteered statements to the effect that Bridges was not a member of the Communist Party there might be some basis for a *suspicion* that such voluntary statements were made pursuant to a previous agreement to make them. But, even according to Garner, neither Schmidt nor Robertson volunteered any statements to him. Such statements were made (if they were made) only because Garner asked questions which called for statements on the subject. This certainly has no tendency to prove that there was any pre-existing agreement that Schmidt and Robertson should make the statement that Bridges was not a member of the Communist Party or that they themselves were not members of the Communist Party.¹² Both Schmidt and Robertson categorically deny that any such agreement had ever been reached prior to August 8, 1945, or at any other time. (Tr. 4195-4197, 4608-4609.)

Indeed, the circumstances under which Robertson was substituted as a witness in the place of Schnur quite positively indicate that Robertson did not even contemplate becoming a witness in the matter until

¹²The testimony about Schmidt's and Robertson's alleged membership in the Communist Party is clearly immaterial in the light of the indictment which charges the "fraud" to consist of misrepresentations concerning *Bridges'* alleged membership in the Communist Party.

he was called to be a witness and after Garner had completed his examination of both Bridges and Schmidt.¹³ Moreover, there is a complete absence of evidence from which it could be inferred that either Schmidt or Robertson had any reason to anticipate that Garner would ask the witnesses whether Bridges was a Communist. As we have already pointed out, the decision in *Bridges v. Wixon, supra*, and particularly the concurring opinion of Mr. Justice Murphy, seemed to make it altogether unlikely that any member of the Immigration and Naturalization Service would again raise the question of whether Bridges was a member of the Communist Party and by so doing would continue or seem to continue the prosecution which Mr. Justice Murphy so vigorously condemned.

Thus every indication to be gleaned from the record is that if Garner in fact asked Schmidt and Robertson whether Bridges was a member of the Communist Party, their respective answers were their own indi-

¹³Robertson testified:

“Suddenly, and I do not know what was happening inside because I was not there—suddenly Dick Gladstein stuck his head out of the door and he looked over at the crowd and he saw me and he said, ‘Come on, Robertson, you will be a witness for Bridges,’ or words to that effect. And of course I was proud of standing up for Bridges and being a character witness for him. I had no idea that this was going to happen, because some time before I had talked to Harry * * * this was weeks before the August period * * * and Harry I can remember very emphatically—Harry said, ‘No, I want two people from the labor movement to represent me. As far as I am concerned it could be Paul Schnur * * * and Henry Schmidt’ * * * So I took it for granted it is going to be Henry and it is going to be Paul. They are going to be his character witnesses.” (Tr. 4607-4608.)

vidual acts and were not pursuant to or in furtherance of any previous arrangement, agreement or understanding.

It is also significant that the charge in the first count of the indictment is that appellants conspired to have *Bridges* state and represent in a naturalization proceeding in the Superior Court "numbered 28152 in the records of said court that he, the said defendant Harry Renton Bridges, had never belonged to the Communist Party in the United States." Such statements and representations as were made by Schmidt and Robertson on August 8, 1945 (even assuming they were made as testified to by Garner) were not statements or representations made by Bridges.¹⁴ Nor were they statements and representations made in any Superior Court proceeding, much less a Superior Court proceeding "numbered 28152" in San Francisco County, since whatever statements and representations were made by Schmidt and Robertson were made before there was any such proceeding in existence. Such a proceeding was commenced by the filing of the petition with the clerk of the Court. That petition was not even typed, much less filed, until *after* Garner had completed his examination of Schmidt and Robertson.¹⁵ Moreover, such

¹⁴The indictment does not allege that appellants conspired to have Schmidt and Robertson make false representations; it alleges that they conspired to have Bridges make false representations. (Tr. 4.)

¹⁵See *supra*, and Garner's testimony concerning his examination of Schmidt and Robertson. "At that time there was no petition. He [Bridges] was merely an applicant to file a petition." (Tr. 457.)

statements and representations as were made on the subject of Communist Party membership by Schmidt and Robertson were made to Garner and not to the Court.¹⁶ And Garner never, in writing or otherwise, even suggested to the Court that Schmidt or Robertson or either of them had made any statements or representations of any kind to him. Such being the case, there is absolutely no basis for the contention that such representations of Schmidt and Robertson (if they made them) constitute either in whole or in part the statement and representation alleged in the first count of the indictment, or that they in any way rendered Bridges' naturalization either false or fraudulent.

The cases clearly demonstrate that the convictions here obtained on the first count of the indictment cannot be sustained. Evidence of a much stronger character than that here found has been held insufficient to support conspiracy convictions. This is particularly so in cases wherein, as here, the government has relied solely upon circumstantial evidence.

In *Kassin v. United States*, 87 F. 2d 183 (5 Cir., 1937), the Court said:

“Wide, sweeping and damaging as is a charge of conspiracy, difficult as it is for one caught in the net of such a charge to extricate himself from it when the government has any evidence tending

¹⁶The indictment alleges that the appellants conspired to have Bridges falsely state and represent certain matters “to the said court”. (Tr. 4.)

to connect him with it, such a charge, no less than charges of substantive offenses, requires proof. This proof may be circumstantial or direct, or both, but it must be proof, that is, the evidence must have a legitimate tendency to impel a belief in and a finding of defendant's guilt. It may not consist merely of circumstances having such remote relation to the facts to be proved as that they have not a probable, but only a possible relevancy * * * Where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence * * * This rule applies with the same force where conspiracy is the charge, as where substantive offenses are in question. Conspiracy does indeed widen the scope of relevant evidence through the operation of the principle of agency or representation by which all are made responsible for the acts of each of the partners in crime. This, however, is not a breakdown, it is merely an application of the rules of evidence. Conspiracy charges do not present opportunities for departure from, they present merely specific instances for the application of, the rules governing the problem of judicial proof * * * One of the prime rules in the trial of criminal cases is that circumstances, when relevant and cogent, may constitute evidence of guilt, but they must have a legal, as well as a logical, relevancy, and they must have probative force; that is, they must point with compelling force to the fact to be

proven. Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt * * * A conviction resting on them alone cannot stand.” (*Ibid.*, 87 F. (2d) at 184-185.)

There is absolutely no evidence, circumstantial or otherwise, which establishes the “moral certainty of guilt” of Schmidt, Robertson or Bridges of the crime *charged in the first count* of the indictment—the crime of conspiring together to have Bridges make a false representation to the Superior Court. There is no evidence which is “inconsistent with every reasonable hypothesis of innocence” of this crime.

In *Peightel v. United States*, 49 F. (2d) 235 (8 Cir., 1931), the Court said:

“When the circumstances relied upon are as consistent with innocence as with guilt, *they are robbed of all probative value* * * *” (*Ibid.*, 49 F. (2d) at 240.)

In *Ribaste v. United States*, 44 F. (2d) 21 (8 Cir., 1930), the Court said:

“It will thus be seen, and it is conceded by counsel for the government that the evidence against Ribaste was wholly circumstantial. The facts and circumstances proved and relied upon by the government to sustain Ribaste’s conviction must therefore not only be consistent with his guilt, but must be inconsistent with his innocence * * *

“Confessedly, there are some suspicious circumstances proven in this case * * * But mere suspicion is not sufficient to prove the guilt of a

defendant beyond a reasonable doubt.” (*Ibid.*, 44 F. (2d) at 23.)

In *Dahly v. United States*, 50 F. (2d) 37 (8 Cir., 1931), the Court said that while circumstantial evidence is equally available with direct evidence to prove a conspiracy,

“* * * suspicion or conjecture cannot take the place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had. Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must in addition thereto, be proof of unlawful agreement and participation therein, with knowledge of the agreement.” (*Ibid.*, 50 F. (2d) at 43.)

The rules enunciated in these and other circuits¹⁷ have been applied by this circuit. See *Laurent v. United States*, 149 F. (2d) 598 (9 Cir., 1945.)

In each of the cases cited the suspicious circumstances were substantially stronger than in the case at bar and yet the convictions were reversed.

¹⁷See also *Tingle v. United States*, 38 F.2d 573 (8 Cir., 1930); *Langer v. United States*, 76 F.2d 817 (8 Cir., 1935); *Gable v. United States*, 84 F.2d 929 (7 Cir., 1936); *Copeland v. United States*, 90 F.2d 78 (5 Cir., 1937); *Fulbright v. United States*, 91 F.2d 210 (8 Cir., 1937); *United States v. Russo*, 123 F.2d 420 (3 Cir., 1941); *Bacon v. United States*, 127 F.2d 985 (8 Cir., 1942); *United States v. Penn*, 131 F.2d 1021 (2 Cir., 1942); *Caldwell v. United States*, 139 F.2d 121 (5 Cir., 1943).

Indeed, properly considered, there are no suspicious circumstances in this case. The only evidence is that *separate* questions were asked and *separate* answers were given. There is not one word to suggest that there was any agreement or conspiracy as charged in the first count of the indictment.

In view of the history of the prior deportation cases, the assumption that persons closely connected with the labor movement made in 1945 that the case was at an end, and the fact that not one of the three appellants volunteered any statement or representation concerning membership in the Communist Party, it is clear that no agreement or conspiracy was or could have been entered into. If there was or had been a conspiracy such as is charged, it is reasonable to believe that at least one of the appellants at some stage of the proceedings would have volunteered statements or representations concerning membership in the Communist Party. That they did not do so, completely negatives the suggestion that they conspired in advance to do so.

POINT V.

THE THIRD COUNT OF THE INDICTMENT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES.

(Specification of Errors 4, 5, 19, 20.)

The language of the third count of the indictment is peculiar, ambiguous and confusing. It does not charge, although it gives the impression of charging,

appellants Schmidt and Robertson with having aided and abetted appellant Bridges in the commission of the crime charged in the second count of the indictment. The third count does not and cannot charge the offense of aiding and abetting since nowhere in that count is it charged that appellant Bridges committed any crime. Lacking an allegation to the effect that Bridges committed any crime, the third count fails to state facts sufficient to constitute an offense by Schmidt and Robertson of having aided and abetted. In *Morgan v. United States*, 159 F. (2d) 85 (10 Cir. [1947]), the Court said:

“One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense.” (*Ibid.*, 159 F. (2d) at 87.)

Furthermore, the third count fails to allege who made the “false and fraudulent statements and representations” therein alleged to have been made. From all that appears in the third count, the pleader might just as well have had reference to the statements which Garner testified Schmidt and Robertson made to him on August 8 as to the testimony which Bridges gave on September 17.

If we look to the statutory authority cited in the indictment, we are directed to the provisions of law under which the pleader was presumably trying to charge Schmidt and Robertson. We are informed that this is 8 U.S.C.A. 746(a) (5).

Section 746 of Title 8 was, prior to its repeal by the Act of June 25, 1948, the penal section of the Nationality Act of 1940 and was unique in that it divided and subdivided down to fractional details the conduct by which the purposes of the Nationality Act could be thwarted and made each of such details a separate statutory offense. As a result, each subdivision of Section 746 covered a very narrow and very precisely defined scope of activity. The outer margins of each offense described in Section 746 were held closely together, thus requiring both precise pleading and precise proof.

That this is so is evident from a comparison of Subdivisions (a)(4)c and (a)(4)d of Section 746. Moreover, these subdivisions need to be considered in order to appreciate fully the limitations of Subdivision (a)(5) (on which Count 3 was presumably based).

Paragraphs "c" and "d" of Subdivision (a)(4) read as follows:

"(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship or otherwise, * * *

(4) to encourage, advise, aid or assist any person * * *

c. not then entitled or qualified under this chapter to apply for naturalization or citizenship, to apply for such naturalization or citizenship, with knowledge that such person was not so entitled or qualified; or

d. not then entitled or qualified under this chapter to obtain naturalization or citizen-

ship; to obtain such naturalization or citizenship, with knowledge that such person was not then so entitled or qualified.”

It will be observed that the only difference between Paragraphs “c” and “d” above is that in “c” the words “applied for” are used, whereas in “d” the word “obtain” is used. Thus two separate offenses are created by these two paragraphs, offenses which are identical except for one detail—that one of them deals with encouraging, etc., a person to apply for citizenship under the circumstances specified, and the other makes it a crime to encourage, etc., a person to obtain citizenship under the circumstances described.

It must be observed that in order to plead either of these two offenses, it is necessary to plead first, facts which made the applicant “not then entitled to qualify under this chapter” to apply for or receive citizenship; and second, facts that the person charged had at the time he encouraged, etc., the applicant to apply for or obtain citizenship, “knowledge that such person was not then so entitled or qualified.”

In this connection it must be further noted that the Nationality Act of 1940 (i.e., “this chapter”) does not make membership in the Communist Party “grounds for refusal of naturalization,”¹ and that to charge that Bridges was not “then entitled or

¹Cf. 8 U.S.C.A. 705 with *Schneiderman v. United States*, 320 U.S. 118, 132, *ftnt.* 8 (1943).

qualified under this chapter” to apply for or receive naturalization on account of Communist Party membership, the pleader would have to allege not merely membership in the Communist Party, but that the Communist Party “believes in, advises, advocates or teaches” one or more of the doctrines specified in 8 U.S.C.A. 705 and that Bridges knew this to be so. Moreover, to charge appellants Schmidt and Robertson of either the offense defined in Subdivision (a)(4)c or (a)(4)d above, the pleader would have had to allege knowledge of all of these things by such appellants.

It is apparent from this that the third count of the indictment does not charge the offense defined by either Subdivision (a)(4)c or (a)(4)d of 8 U.S.C.A. 746.

Before considering directly Subdivision (a)(5) of Section 746, we should like to call attention to Subdivision (a)(1) for the purpose of showing first, that the pleader was not attempting to charge Schmidt and Robertson with the offense therein defined; and second, that the offense therein defined is not within the compass of the offense defined in Subdivision (a)(5).

Subdivision (a)(1) reads as follows:

“(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise * * *

(1) knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or

under, or by virtue of any law of the United States relating to naturalization or citizenship.”

It was presumably under this subdivision that the second count of the indictment was drawn. A comparison of the second and third counts of the indictment and a comparison of Subdivision (a)(1) of Section 746 and the third count of the indictment makes it manifest that the third count does not charge Schmidt and Robertson with the offense defined in Subdivision (a)(1) of 8 U.S.C.A. 746.

Subdivision (a)(5) of the section under which the third count of the indictment presumably was drawn reads as follows:

“(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or otherwise * * *

(5) to encourage, aid, advise or assist any person not entitled thereto to obtain, accept, or receive any certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or citizenship—

a. knowing the same to have been procured by fraud;

b. knowing the same to have been procured by the use or means of any false name or false statement given or made with the intent to procure the issuance of such certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship,

or other documentary evidence of naturalization or citizenship; or

c. knowing the same to have been altered in any manner.”

It will be observed that the offense so defined is not that of aiding or abetting another in the commission of another offense, but is complete in itself upon the mere advising of another to obtain, accept or receive the documentary evidence described under the circumstances proscribed. To constitute such an offense, however, certain conditions must be met.

The first is that the person so encouraged, etc., be “not entitled thereto”. That is, that the person in question be not entitled to the documentary evidence involved. While it is alleged in the third count of the indictment that Bridges was “not then and there entitled thereto”, such an allegation is merely the conclusion of the pleader. No facts are alleged which, if true, would show that Bridges was not then and there entitled to the documentary evidence in question.

A second and indispensable element to the offense is that the documentary evidence to be obtained, accepted or received be already in existence. This is made manifest by the use of the words “to have been” contained in each of the clauses “a”, “b”, and “c” of Subdivision (a)(5). The phrase “to have been” refers to something in the past and not to something in the future. There is no allegation in the third count of the indictment that the certificate of natu-

ralization to which reference is there made was in existence at the time the acts charged to Schmidt and Robertson occurred. On the contrary, by the use of the words "which was to be procured" used in the third count of the indictment in connection with the certificate of naturalization, the pleader negatived the pre-existence of such a certificate. The allegation "and was procured" in juxtaposition with the allegation "which was to be procured" denotes the past only with relation to the time of the indictment but not in relation to the time the offense is alleged to have been committed.

A third essential element of the crime defined by Subsection (a)(5) is that the defendant knew (at the time he encouraged, etc., another to obtain the pre-existing documentary evidence) that such evidence had theretofore been procured (a) by fraud; (b) by the use of false statements; or (c) had been altered. And in the case of (b) (i.e., where the defendant is charged with knowing that the documentary evidence had been procured by the use of a false statement), it is also an ingredient of the crime and therefore must be alleged that the defendant knew that the false statement had been made "with the intent to procure the issuance" of such documentary evidence. The third count of the indictment fails to allege any such knowledge of pre-existing facts by either Schmidt or Robertson.

To recapitulate: The third count of the indictment fails to state facts sufficient to constitute the offense defined by Subdivision (a)(5) of 8 U.S.C.A. 746 in

that first, it fails to allege facts sufficient to show that Bridges was not then entitled to obtain a certificate of naturalization; second, it fails to allege that at the time the offense was alleged to have been committed there was in existence a certificate of naturalization which could have been accepted or received by Bridges; and third, it fails to allege that Schmidt and Robertson or either of them had any knowledge that such a certificate (if it were in existence) had been procured by fraud or had been procured by the use of any false statements made with the intent to procure the issuance of such a certificate (or—although we assume the government is not relying on clause “c”—had been altered in any manner).

The third count of the indictment is in reality a hodge-podge of allegations, some of which have relation to the elements of the offense defined in Subdivision (a)(1) of 8 U.S.C.A. 746, some of which have relation to the offense defined in Subdivision (a)(4)c of that section, some of which have relation to the offense defined in Subdivision (a)(4)d thereof, some of which have relation to the offense defined in Subdivision (a)(5)a thereof, some of which have relation to the offense defined in Subdivision (a)(5)b thereof, and some of which, finally, have relation to the offense of aiding and abetting the commission of the offense defined in Subdivision (a)(1) thereof. But the third count of the indictment fails to include all of the elements of any one of these offenses. What the pleader attempted to do was to construct and plead a new offense, an offense not found in any

statute, by selecting and commingling the elements of a number of statutory offenses. However, since as we pointed out at the outset, the various subdivisions of Section 746 of Title 8 were all carefully drawn and delineated to set up a series of separate and distinct offenses, and since the only crimes involved here are statutory and not "common law" crimes, we submit that the third count of the indictment does not state facts sufficient to constitute an offense against the United States.

POINT VI.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANTS SCHMIDT OR ROBERTSON, OR EITHER OF THEM, OF THE OFFENSE CHARGED IN THE THIRD COUNT OF THE INDICTMENT.

(Specification of Errors 4, 5, 19, 20.)

By making this point we are not waiving the point that the third count fails to state facts sufficient to constitute an offense. For whether it does or does not do so, the evidence is insufficient to sustain the conviction of either Robertson or Schmidt under that count.

This is so for each of the following reasons:

1. The record contains no evidence that a *certificate of naturalization* was ever issued to or in the name of appellant Bridges. The last step in the naturalization proceeding of appellant Bridges shown by the record is the judgment of the Superior Court of

the State of California, dated September 17, 1945, admitting 18 or 19 persons, including as the third named person Harry R. Bridges, to citizenship. (U.S. Ex. 4; Tr. 551-553.) Such judgment, of course, relating to a number of persons is not and was not the certificate of naturalization of appellant Bridges. (See 8 U.S.C.A. 734-736.)

2. The record contains no evidence that the appellant Bridges ever applied for or obtained, or accepted, or received a *certificate of naturalization*.

3. The record contains no evidence that appellants Robertson or Schmidt, or either of them, ever either knowingly or unknowingly encouraged or aided, or advised, or assisted appellant Bridges either to apply for or to obtain, accept or receive a *certificate of naturalization*.

4. The record contains no evidence that prior to the completion of all the services rendered by appellants Schmidt and Robertson to appellant Bridges (which services were completed on September 17, 1945, at that instant when the clerk of the Court and the Court itself excused them from further attendance—that is, *before* appellant Bridges testified on his own behalf) that appellant Bridges was for any reason, statutory or otherwise, not entitled to apply for and receive naturalization, or that appellants Schmidt and Robertson, or either of them, knew that appellant Bridges was for any reason, statutory or otherwise, not entitled to apply for and receive naturalization.

5. The record contains no evidence that prior to the completion of all the services rendered by appellants Schmidt and Robertson to appellant Bridges, as aforesaid, that appellants Schmidt and Robertson, or either of them, had any knowledge that either the naturalization of appellant Bridges or the issuance of a certificate of naturalization to appellant Bridges *had been procured* by fraud or *had been procured* by the use or means of any false name or any false statement *used or made* with intent to procure such naturalization, or that such certificate of naturalization *had been altered* in any way.

6. The record contains no evidence that appellants Schmidt and Robertson, or either of them, aided or abetted appellant Bridges in the commission of the charge against appellant Bridges in the second count of the indictment.

Of the foregoing points those numbered 1, 2, 3 and 6 are self-explanatory. There simply is no evidence in the record to support any conclusion contrary to that asserted above.

As far as points 4 and 5 are concerned, it is only needed to be called to the Court's attention our previous reference to *Schneiderman v. United States*, *supra*, and its relationship to 8 U.S.C.A. 705; and further to direct the Court's attention to the fact that the trial judge in his charge instructed the jury as follows:

“The aims, purposes and objectives of the Communist Party are not in issue under the indictment as framed, nor is it incumbent upon

the Government to prove to a moral certainty and beyond a reasonable doubt that one of the asserted aims or purposes was to overthrow the government by force and violence.

“That issue is entirely immaterial to any ultimate consideration under the evidence as to the guilt or innocence of Harry Bridges and co-defendants J. R. Robertson and Henry Schmidt.” (Tr. 7889.)

In further support of the contention made in this point, we refer the Court to the authorities cited by us under Point IV.

POINT VII.

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN QUESTIONING THE DEFENSE WITNESS FATHER PAUL MEINECKE AND IN MAKING STATEMENTS IN THE PRESENCE OF THE JURY CONCERNING HIS PURPOSE IN ASKING CERTAIN OF THE QUESTIONS WHICH HE ASKED FATHER MEINECKE.

(Specification of Errors 15, 16, 17.)

In the Briefs for Appellant *MacInnis v. United States of America*, No. 12,599 in this Court, the prejudicial misconduct of Judge Harris in questioning the defense witness Father Paul Meinecke, and in making statements in the presence of the jury concerning his purpose in asking those questions, is gone into in considerable detail and in such a way as to reveal that the purpose of Judge Harris in questioning Father Meinecke was to discredit that testimony, to destroy it in the minds of the jury, to deprive the defendants of its benefit and to do so not by any attack upon the

honesty or sincerity of Father Meinecke but by telling the jury in effect that among the facts surrounding Father Meinecke which he, Judge Harris, had a desire to provide to the jury was the fact that Father Meinecke was unbalanced upon the particular subject on which he testified.

We herewith adopt as a part of this brief and incorporate herein by reference that portion of the argument in the Opening Brief for appellant in *MacInnis v. United States, supra*, commencing with the subtitle "Summary of Background Facts" on page 8 and extending to the subtitle Six as quoted on page 49, and all of the argument, including the authorities cited, in Reply Brief for appellant in the said case of *MacInnis v. United States*.

To tie such argument into the present record we contend that the following questions asked by Judge Harris of Father Meinecke, and the following statements by Judge Harris in the presence of the jury concerning his purpose in asking such questions, constituted prejudicial misconduct:

A. The question, "Did you receive a subpoena to attend this court?" (Tr. 4379), and the following explanation, "* * * I think the first question I asked him was whether or not he was subpoenaed. That was overlooked. I think in fairness to Father Meinecke it was a question that should have been asked showing his purpose in coming here." (Tr. 4385-4386.)

The said question and the said explanation inferred that some onus or stigma attached to a person who

came forth voluntarily to give testimony favorable to appellants, and that the question had been asked to give Father Meinecke the opportunity to relieve himself of that onus or stigma by testifying that he was present under the compulsion of subpoena, as more fully explained on pages 21-22 of the Opening Brief for appellant in *MacInnis v. United States*, *supra*.

B. The series of questions commencing with "Did you arrive here today, Father, this morning?" through "You are rather complimentary. After you spent the evening there and enjoyed the social activities, then you had a discussion concerning the testimony that might be given in this case?" (Tr. 4379.)

Such questions inferred that figuratively speaking Bridges, MacInnis and Father Meinecke were as three cards out of the same deck, having different faces but the same back, substance and texture, or in other words, that Father Meinecke was something less than a free, independent and responsible witness and while the voice was his, the words were appellants' and the testimony was that of Bridges himself, as more fully explained on pages 40-41 of the Opening Brief for appellant in *MacInnis v. United States*, *supra*.

C. The questions "Do you have difficulty, Father, with your memory or recollection under ordinary conditions?" and "In San Francisco, Father, you were perfectly conversant and well oriented, weren't you, with respect to dates and the like?", and "Since you went to Nevada your orientation has become poor, has it?", and "Have you been recently subjected to

medical treatment, Father?" (Tr. 4380, 4381), together with that portion of Judge Harris' explanation to the jury concerning his purpose in asking such questions, commencing at the bottom of page 4386 of the record with the words, "Latterly in my examination of Father Meinecke", etc., and ending with the sentence, "Very many people have to leave large metropolitan areas to go to less burdensome parishes and that was the reason underlying my question". (Tr. 4387.) Such questions and explanation had the effect of telling the jury that Father Meinecke had an insane delusion on the subject of whether appellant was a member of the Communist Party, as more fully explained in the Opening Brief for appellant in *MacInnis v. United States, supra*, pages 12-32, inclusive.

D. The question, "Have you been recently subjected to medical treatment, Father?" (Tr. 4379.) This constituted prejudicial misconduct particularly in view of the previous ruling by Judge Harris (with respect to the witness Crouch [Tr. 2697] and with respect to the witness Michener [Tr. 3559]) that such a question was improper in that the answer might tend to degrade the witness and that the only purpose for which such a question could be asked was to obtain an answer which would degrade the witness, as more fully explained in the Opening Brief for appellant in *MacInnis v. United States, supra*, at pages 33-37.

E. The statements by Judge Harris, "Mr. MacInnis invited it" and "Mr. MacInnis invited me to

ask the question". (Tr. 4381.) These constituted prejudicial misconduct in that such statements were false as a matter of official record and had the effect of telling the jury that Mr. MacInnis, the attorney for appellants Schmidt and Robertson, was lying and was trying to deceive them, and in that by so telling the jury, they had an irresistible tendency completely to discredit Mr. MacInnis in the minds of the jury and thereby wrongfully and unconstitutionally to deprive appellants Schmidt and Robertson of his effective services as counsel, as more fully explained in the Reply Brief for appellant in *MacInnis v. United States*, *supra*, pages 5-6.

In support of our contentions under this point, we cite this Court's decision in *Williams v. United States*, 93 F.2d 685 (9 Cir., 1937), and the cases therein cited, and quoted from, including *Adler v. United States*, 182 F. 464 (5 Cir., 1910); *Frantz v. United States*, 62 F.2d 737 (6 Cir., 1933); *Hunter v. United States*, 62 F.2d 217 (5 Cir., 1932).

Quercia v. United States, 289 U.S. 466 (1933) and *Glasser v. United States*, 315 U.S. 60 (1942), together demonstrate that by his attitude toward counsel, a trial judge may, as we submit he did here, in effect deprive a defendant of "untrammelled and unimpaired"¹ assistance of counsel.

¹*Glasser v. United States*, *supra* at 70.

POINT VIII.

THE TRIAL COURT ERRED IN REFUSING TO ADMIT IN EVIDENCE THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN *BRIDGES v. WIXON*, 326 U.S. 135, IN RELATION TO AND IN EXPLANATION OF THE TESTIMONY OF APPELLANTS SCHMIDT AND ROBERTSON TO THE EFFECT THAT THEY HAD READ SAID DECISION AND IN PART ON THE BASIS THEREOF HAD COME TO THE CONCLUSION THAT APPELLANT BRIDGES WAS NOT AND NEVER HAD BEEN A MEMBER OF THE COMMUNIST PARTY IN THE UNITED STATES.

(Specification of Errors 10, 19, 20.)

Appellant Schmidt testified that he based the answers which he gave in the naturalization proceeding of the defendant Bridges upon two things: first, his own knowledge and association with the defendant Bridges over the years; and, second, upon his own reading of the opinion of the Supreme Court of the United States. (Tr. 4225-6.) As soon as such testimony was given, there was offered in evidence defendants' Exhibit B for identification, being the decision of the Supreme Court of the United States in the case of *Bridges v. Wixon*, October Term 1944. (Tr. 4226.) Objection was immediately made to the introduction of such decision in evidence, which objection was immediately sustained.

Appellant Robertson testified that prior to giving testimony in the naturalization proceeding of appellant Bridges he read the decision of the Supreme Court of the United States and identified defendants' Exhibit B for identification as the decision to which he referred, and that he based his opinion that Harry

Bridges was not a member of the Communist Party in part upon his own observations and knowledge of Harry Bridges and in part upon the decision of the Supreme Court of the United States. The defendants' Exhibit B for identification was again offered in evidence, and again rejected. (Tr. 4617.)

The following cases make it clear that the refusal to permit the introduction into evidence of the decision of the Supreme Court in connection with the aforesaid testimony of appellants Schmidt and Robertson constituted reversible error:

Potter v. United States, 155 U.S. 438 (1894);
Harrison v. United States, 200 Fed. 662 (6 Cir., 1912);

Buchanan v. United States, 233 Fed. 257 (8 Cir., 1916);

Hyde v. United States, 15 Fed. (2d) 816 (4 Cir., 1926);

Miller v. United States, 120 Fed. (2d) 968 (10 Cir., 1941).

POINT IX.

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN READING IN THE PRESENCE OF THE JURY THE STATEMENT OF HIS REASONS FOR REFUSING TO PERMIT COUNSEL FOR THE DEFENSE TO CROSS-EXAMINE GOVERNMENT WITNESS KESSLER CONCERNING HIS ACTIVITIES IN CONNECTION WITH THE PREPARATION OF THE CASE AGAINST THE DEFENDANTS.

(Specification of Error 18.)

Only two agents of the Bureau of Naturalization were produced as witnesses for the Government. One was Naturalization Examiner Garner, the Government's first witness, and the other was Lawrence R. Kessler, who testified on January 12, 1950. (Tr. 3578, 3583.) The Government rested its case on January 16, 1950. (Tr. 3663, 3671.) In other words, and we want to make this unmistakably clear, Kessler testified before so much as a single witness for the defense was called.

The direct examination of Kessler was exceedingly brief, and on casual examination might seem to have been on an insignificant factual point. Actually that testimony had a very important purpose to serve. To understand that purpose and its importance the background facts need to be stated.

One of the witnesses by which the Government attempted to prove that appellant Bridges had been a member of the Communist party was Lewis Michener, Jr. One of the important items of his testimony in that respect pertained to an alleged Communist Party meeting in the Sunset District in San Francisco in

the year 1940, which meeting, according to Michener, was attended by Communist Party members only, was attended by Bridges, and dealt with Communist Party affairs. The date of such alleged meeting was important, for if it was held on a day or during a period when Bridges could be proven not to have been in San Francisco Michener's testimony concerning that meeting, and indeed his entire testimony, would thereby be discredited.

In 1940 Michener resided in Southern California. The dates of his visits to San Francisco could therefore be established by his hotel registrations in San Francisco.

On direct examination Michener testified that on the occasion of that alleged Communist Party meeting in the Sunset District he stopped at the Shaw Hotel in San Francisco and that that meeting was held "late in 1940". (Tr. 3343.) On cross-examination he said that it was held "in the latter part of 1940". (Tr. 3475, 3477.) He was then shown a photostatic copy of his registration card at the Shaw Hotel dated *February* 9, 1940 (Tr. 3480) and such registration card was offered in evidence. (Tr. 3481.) Counsel for the Government objected to the introduction of such registration on the ground that "he might have stopped there a half dozen times in 1940". Whereupon counsel for the defense stated, "We will show that it is the *only* registration of L. H. Michener or Lewis Michener in 1940 at the Shaw Hotel." (Tr. 3481.)

The following day, on redirect examination, Michener testified that the aforesaid meeting was held "in late 1940. I couldn't exactly tell you the exact time." (Tr. 3566.) *Government counsel then showed him a registration card of the Shaw Hotel bearing an August 1940 date (Tr. 3566), which he identified as his registration. (Tr. 3567.)*

Counsel for the Government then undertook to explain that immigration officers investigating at the Shaw Hotel had located that card and realizing its importance, had asked the hotel to keep it in a safe place and that they had placed it in the hotel safe, and that probably when investigators for the defendants went through the registration files they did not see that card (because it was in the hotel safe rather than in the registration files.) (Tr. 3567.)

The Court then asked for evidence on that point. (Tr. 3567-8.) An assistant manager of the hotel was produced who testified that a Mr. Kessler, a Government agent, borrowed that card on October 6 (1949), returned it several days later, and had re-borrowed it "yesterday, I think—or today" or "a couple of days ago". (Tr. 3574-5.)

Kessler was then put on the stand. He testified that he obtained the card October 5 "last year" (1949) and returned it October 7 or 8, 1949 and "I next saw the card this morning. I went over to the hotel this morning about 8:30 I saw Mrs. Elliott, and she gave me the card this morning." (Tr. 3579-80.)

It will be observed that the purpose of Kessler's testimony was to establish that the prosecution had not been in possession of that registration card when Michener was under direct examination. Its purpose thus was to rebut an inference that the prosecution had sequestered and concealed that card to prevent the possible discrediting of Michener in the event his testimony concerning the alleged meeting was shown to be false.

The date on that registration card was August 26, 1940 (Tr. 3588), which certainly was not "late in 1940" as testified to by Michener both on direct and redirect examination, and only by unreasonable extension could it be said to be in the "latter part of 1940" as testified to by Michener on cross-examination. Had the prosecution sequestered and concealed that registration card to prevent the defendants from discovering its date, the prosecution would have been without good faith or integrity in the matter. If the prosecutors knew of that card and of its date at the time they permitted Michener to fix the time of the alleged Communist meeting as "late in 1940", they were chargeable with being parties to the introduction of inaccurate and deceptive evidence.

Thus the purpose of Kessler's testimony was to bolster up the good faith of the prosecution and the prosecutors. *That was its only purpose.* Moreover, if Kessler was not himself a credible witness—that is, if he could be shown not to be a credible witness—that purpose would fail.

At the commencement of the cross-examination of Kessler, defense counsel stated that he intended to put a great many questions to Kessler relating to his activities in the case. Whereupon the trial judge stated: "Counsel, *I shall limit the cross-examination of this witness* at this stage of the proceedings to matters pertaining to this card and no other matters." (Tr. 3580.) After a short discussion, in which the trial judge again stated in effect that no cross-examination to test the credibility of the witness would be permitted, the noon recess was taken. (Tr. 3581-2-3.) That afternoon defense counsel asked Kessler the following question:

"Now, let me ask you whether in May, 1949, accompanied by an agent Meyers—or whether you accompanied that agent named Meyers, and went to visit a man named Herman Mann,—* * * and then and there offered to Mr. Mann that you would procure the services of the United States Cancer Research to cure his dying wife if he would come and testify against Bridges. Did you, Mr. Kessler?" (Tr. 3605-6.)

An objection was interposed. In ruling, the trial judge *read from a written memorandum*, as is clearly indicated by the subsequent statement of the trial judge that certain language in that ruling " * * * unfortunately crept into *the note*." (Tr. 3610.)

The ruling of the trial judge (as so read *to the jury*) was as follows:

"The Court. My examination of authorities, of the authorities during the noon hour, Mr. Hal-

linan, would justify me in the reassertion of the rule which I think is sound, (1), that the cross-examination in the main is limited to that which is elicited and brought out in chief, on direct; secondly, that the discretion vests in the trial court with respect to the limitations upon that cross-examination. The matter elicited on direct examination had to do with a card. I have allowed you full and complete scope in and with respect to the card, all the surrounding circumstances, the conversation had with the agents and the attorneys. You have been permitted to state to the jury, before my admonition, in connection with the characterization about this card. I have admonished the jury to disregard your statement.

For your information, I reviewed the following authorities and you might note them in your book——

Mr. Hallinan. Pardon me, if I may.

The Court. ——so you may have them hereafter.

United States v. Toner, 173 Fed. 2d 140 at 144. The language of Justice Stone in the Supreme Court decision of Alford v. United States, 682, 687, wherein Justice Stone said, in part:

‘There is a duty to protect him (that is the witness) from questions which go beyond the bounds of proper cross-examination merely to harass, annoy and humiliate him.’

The case of United States v. Easterday, 57 Fed. 2d 165 at 166. This is United States v. Easterday, E-a-s-t-e-r-d-a-y, at 57 Fed. 2d 165, at 166. And this is Justice Learned Hand, speaking for the Circuit Court:

‘Cross-examination does not extend to aimless shots at random; a trial presupposes rational process applied to the testimony uttered. The judge was not bound to allow what otherwise had no bearing on the witness’ credibility.’

Then in *Morton v. U. S.*, at 60 Fed. 2d 696, at 699. *And the language used in this Morton case is somewhat reminiscent of your expectation or hope that some error might be created in the record.*¹ The Court said——

Mr. Hallinan. It is no hope, Your Honor; I hope no error will be created. I tried to argue Your Honor into permitting the evidence in.

The Court. I am trying my level best to keep error out of the record.

The Court then said:

‘The battle continued, not to ascertain the truth, but in the evident hope that error might be injected into the record and ultimate conviction thereby avoided. But avoidance of a conviction upon uncontradicted evidence, establishing to a certainty the guilt of the accused, * * * and so forth. Then the Court concluded:

‘Nevertheless, the ascertainment of the truth by means of a fair trial, rather than the slavish devotion to the rules of the game, is the determinative factor in ascertaining the existence of prejudicial error.’

I also referred to the *Gerson* case, *Gerson v. U. S.*, 88 Fed. 2d 358, at 361:

‘The extent of cross-examination with respect to an appropriate subject of inquiry is within

¹Remember, this was said *in the presence* of the jury.

the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.' '' (Tr. 3607-3610.)

By the quotation from the *Morton* case, coupled with the introductory remark relating it to the conduct of defense counsel, the trial judge told the jury:

(1) That the question asked of Kessler was not asked to ascertain the truth, (2) but was asked in the hope of injecting error into the record and (3) to avoid a conviction which should result from (4) uncontradicted evidence (5) establishing to a certainty the guilt of the accused.

If this was not prejudicial misconduct, and flagrant prejudicial misconduct, then there is no such thing as prejudicial misconduct. If this does not constitute reversible error, then there is no such thing as reversible error.

What the *Court of Appeals* said in the *Morton* case was said *after the trial was completed, the verdict of guilty was returned, the judgment of conviction was pronounced, and the case reached the higher Court*. It was said in deciding whether error committed at the trial was or was not prejudicial in view of the entire record of the trial. It could not have had any effect on the minds of the jury or have contributed in any way to their verdict.

What the trial judge said in quoting from the *Morton* case was said before even the case in chief of the prosecution was complete, and at a time when it was impossible for anyone to say that at the termi-

nation of the trial the evidence would be uncontradicted or that it would establish to a certainty, or to any other degree, the guilt of the accused. Moreover, it would have been improper for the trial judge at any stage of the trial prior to the rendition of verdicts by the jury, to have said in the presence of the jury that the evidence established "to a certainty the guilt of the accused."

Moreover, what the trial judge said in quoting from the *Morton* case not only could have had an effect upon the jury, but quite obviously was designed and intended to have such an effect. Certainly the quotation from the *Morton* case had not "crept into the note" which the judge was reading; it had been inserted in that note by the judge. Certainly the judge must have realized that his reading of that quotation in the presence of the jury would have had a powerful effect upon the jury. That quotation was wholly unnecessary to the ruling which the judge was making, and at the stage of the trial in which it was read it was not even in point as a matter of law—that is, it was not even germane to the ruling.

It is our conviction and we contend:

(1) That the insertion of the quotation from the *Morton* case in the "note" made it appear to the jury that an Appellate Court had condemned questions such as put by defense counsel in the *Bridges* case as having been put in bad faith and thus not only justified but compelled the ruling of the judge in sustaining the objection to the question.

(2) That the insertion of the quotation from the *Morton* case in the “note” broke up and destroyed the legitimate attack which defense counsel were making on the prosecution and the witnesses for the prosecution and upon the case of the prosecution, and resulted in a counter-attack by the judge upon defense counsel and upon the appellants themselves.

(3) That the insertion of the quotation from the *Morton* case in the “note” made unmistakably clear to the jury that the trial judge was convinced that the defendants were guilty and should be convicted and that their defense was a sham and was despicable and should be ignored and rejected by the jury.

Moreover, the second of the two quotations from the *Morton* case, namely, the quotation reading

“Nevertheless, the ascertainment of the truth by means of a fair trial, rather than the slavish devotion to the rules of the game, is the determinative factor in ascertaining the existence of *prejudicial* error.”,

indicates quite conclusively that in making his ruling the judge realized that according to “the rules of the game”—that is, according to the rules of evidence—the question to which he was then sustaining an objection was a proper question, that he was committing error in sustaining the objection to that question, and that he was counting upon this Court to sustain him in that ruling by holding that his ruling, *although erroneous*, was not prejudicial. Certainly a trial judge ought not consciously to commit error—even though he

thinks it may not be "prejudicial". At the least this indicates an attitude on the part of the judge which is not consistent with the high role he is called upon to play.

That the question was asked in good faith is revealed by the affidavit of Herman Mann (Defendants' Exhibit K-1 for identification). This was submitted to the trial Court by way of an offer of proof to show that appellants legitimately sought to discredit Kessler as a witness by evidence of his wrongful conduct in connection with the preparation of the case against them. (Tr. 3612-3-4.) That the trial judge's statement of his reasons for sustaining the objection to the question, made in the presence of the jury, constituted prejudicial misconduct and reversible error is made manifest by this Court's decision in *Williams v. United States*, 93 Fed.2d 685 (9 Cir., 1937) and by the following cases therein cited and quoted from:

Adler v. United States, 182 Fed. 464 (5 Cir., 1910);

Hunter v. United States, 62 Fed.2d 217 (5 Cir., 1932);

Frantz v. United States, 62 Fed.2d 737 (6 Cir., 1933);

Quercia v. United States, 289 U.S. 466 (1933).

The record discloses that as soon as the trial judge concluded the foregoing statement in the presence of the jury the following occurred:

"Mr. Hallinan: Your Honor, at this time, because of the citation of certain language in one

of these cases, which might—I hope not—be a reflection upon me——

The Court: That language may be stricken from the record and I advise the jury to disregard it. It unfortunately crept into the note.

Mr. Hallinan: I move for a mistrial, Your Honor, on the ground that the statement of the Court is manifestly prejudicial. Now, I mean, the mere fact that Your Honor read it and has stricken it out——

The Court: The motion for a mistrial is denied.” (R. 3610.)

Observe how quickly the trial judge recognized that his quotation from “one of these cases” had been improper. Observe also that the trial judge’s order striking “that language” from the record and his “advise”-ing the jury to disregard it did not inform the jury what language was being stricken, nor did it direct or admonish or instruct the jury to disregard any specific language. This exceedingly weak gesture of correction corrected nothing. Indeed, the statement of the trial judge was of such a character that the error was beyond correction other than by the declaration of a mistrial. The motion for a mistrial should have been granted, and we submit this error alone necessitates a reversal of all verdicts and judgments of conviction involved on this appeal.

POINT X.

**THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN
THE GIVING OF INSTRUCTIONS TO THE JURY AND
IN THE REFUSAL TO GIVE INSTRUCTIONS RE-
QUESTED BY THE DEFENDANTS.**

(Specification of Errors 13, 14.)

PRELIMINARY STATEMENT.

Quite a few of the prejudicially erroneous instructions given by the trial Court to the jury were not objected to by counsel for the defendants in compliance with the requirements of Rule 30 of the Federal Rules of Criminal Procedure. Such instructions, however, constituted "plain error" under Rule 52(b) of those rules and for that reason were not only reviewable on this appeal but should be reviewed on this appeal.

Wiborg v. United States, 163 U.S. 632 (1896) ;

United States v. Ausmeyer, 152 F.2d 349
(2 Cir., 1945) ;

Anderson v. United States, 157 F.2d 429 (9
Cir., 1946) ;

United States v. Perplies, 165 F.2d 874 (7 Cir.,
1948) ;

Jones v. United States, 175 F.2d 544 (9 Cir.,
1949).

Most of the instructions given by the trial Court in its charge to the jury were given by the trial Court of its own volition and defense counsel were not, prior to the giving of that charge, aware of them. The errors in those instructions were so numerous that to detect and specify the legal defects in all of those in-

structions or even in a substantial portion of them *as they were being read to the jury* and at the same time to continue to listen to the instructions being read would have been like trying to recognize and locate and measure and record the individual lashing drops of rain during the height of a hurricane. This is true particularly because the charge went from one subject to another and back again in such a random fashion, dispersing the several instructions on each particular subject throughout the charge as a whole, so that the correlation of those instructions as they were being read was a practical impossibility. Moreover, as we will show in the case of several of the instructions proposed by the prosecution and given by the trial Court, the prosecution had annexed thereto misleading and deceptive case citations which only lengthy research could have unmasked and thus those instructions were imposed upon defense counsel and possibly upon the trial Court by the prosecution.

I. INSTRUCTIONS ON REASONABLE DOUBT.

The first instruction to which we call attention falls in this category. It was the prosecution's proposed instruction No. 1 (Tr. 319, 7885-7886), Specification of Error No. 13(j), *supra*. The citation at the bottom of that instruction as proposed by the prosecution reads as follows:

“(Charge of Murrah, D.J., W.D. Okla., *Pietch v. United States*, 110 F.(2d) 817 (C.C.A. 10; cert. den. 310 U.S. 648.)”

There is no mention of such an instruction in the reported case of *Pietch v. United States*, 110 F.2d 817. We have had the clerk of this Court procure from the clerk of the Court of Appeals for the Tenth Circuit the record and the briefs in that case. An inspection of that case reveals that while Judge Murrah did give such an instruction in that case, *no point was made thereof on appeal*. In other words, the prosecution "got by" with such an instruction in the *Pietch* case and as far as the trial Court is concerned, "got by" with it on this case.

And, "got by" is the proper term.

The instruction commences:

"The term reasonable doubt means a doubt *for which a good reason can be given* in the light of the evidence * * *"

This and other Courts have withheld approval of an instruction to the effect that a reasonable doubt was a doubt for which a reason could be given.

Owens v. United States, 130 Fed. 279 (9 Cir., 1904);

Griggs v. United States, 158 Fed. 572 (9 Cir., 1908);

United States v. Woods, 66 F.2d 262 (2 Cir., 1933).

In our case, "a reason" is changed to "a *good* reason". The addition of the word "good" makes the instruction much more erroneous and much more prejudicial—indeed, it makes the instruction inescapably prejudicial. It changes the entire tenor of the rea-

sonable doubt doctrine, making of it a *positive obstacle to be overcome by the defendant* instead of a stout staff to be wielded in the defendant's favor. In effect it places on the defendant the burden of presenting and establishing to the jury's satisfaction "a good reason" for not convicting him or else suffer conviction.

A reasonable doubt is a doubt and nothing more. It is a doubt based upon reason and not one springing from fancy, but is still a doubt, an uncertainty, a negative thing.

Conversely, "a reason", and particularly "a *good* reason" is a positive thing, an affirmative thing, not only much more than a doubt but the very opposite from a doubt.

The trial Court in this case went much further than District Judge Murrah did in the *Pietch* case, *supra*, for in addition to giving an instruction as requested by the prosecution, Judge Harris instructed the jury as follows:

"Remember that the defendant or defendants are entitled to any reasonable doubt, *as defined*, that you may have in your minds; but at the same time also remember that if you have *no such doubt*, the government is entitled to a verdict." (Tr. 7886.)

This compounded the error of the instruction as proposed by the prosecution. It emphasized that error. It demanded of the jury that they have a good reason for acquitting the defendants and that in the

absence of such an affirmative thing as a good reason, they convict the defendants because lacking such a good reason, "the government is *entitled* to a verdict." The prosecution's proposed instruction No. 1 was the only instruction given by the trial Court in which any attempt was made to define the term "reasonable doubt", so that such instruction was not "corrected" by any other instruction.

The defendants proposed two instructions on the doctrine of reasonable doubt, viz., Defendants' Proposed Instructions Nos. 76 and 78, both of which were refused as "covered elsewhere". (Tr. 289-290.) They were covered elsewhere only by an instruction in direct conflict with them.

The refusal to give such two instructions are assigned in Specification of Error No. 13A(g) (No. 76 and No. 78), pages 40-41, *supra*.

Defendants' Proposed Instruction No. 76 was expressly approved by the Supreme Court in *Holt v. United States*, 218 U.S. 245 (1910). The refusal to give Defendants' Proposed Instructions Nos. 76 and 78 in the absence of instructions to the same effect constituted prejudicial error.

II. INSTRUCTIONS ON CREDIBILITY OF WITNESSES.

Another instruction proposed by the prosecution under a misleading and deceptive citation was the prosecution's proposed instruction No. 3 (Tr. 320-321) given by the trial Court (Tr. 7869-7870), Speci-

fication of Error No. 13(d), page 21, *supra*. The citation under that instruction as proposed by the prosecution was in these words:

“(Charge of Dawkins, D.J., W.D. La., *Leche v. United States*, 118 F.(2d) 246; cert. den. 314 U.S. 617.)”

The cited decision makes no mention of such an instruction and an examination of the records and briefs in that case reveal that although such an instruction was given, *no point was made thereof on appeal*; in other words, it was another instance where the prosecution “got by”. This instruction was one relating to the credibility of witnesses in general. Its vice is partly due to a statement therein made but mainly because of the contrast between that statement and another instruction given by the trial Court in relation to the credibility of the defendants as witnesses. In other words, two quite different standards were set up, one applicable to witnesses for the prosecution and the other applicable to the defendants who were their own main witnesses, to the great prejudice of the defendants. The objectionable statement contained in this instruction reads as follows:

“If the witness has the appearance of attempting to the best of his ability to tell the truth, and other circumstances tend to establish that situation, then you give full credit to his testimony.”

Thus the instruction of witnesses in general which would include all of the witnesses for the prosecution, was to be based upon “the *appearance*” of the witness “of *attempting* to the *best* of his *ability* to tell

the truth", in which case the jury shall "*give FULL credit to his testimony*", i.e., to all of his testimony.

As applied to witnesses for the prosecution, what does this leave of the presumption of innocence and the doctrine of reasonable doubt? Virtually nothing, for if *appearance of attempting* to tell the truth is sufficient to give *full credit* to *all* the testimony of such witnesses, then the presumption of innocence is displaced by a presumption of guilt where *any* of that testimony (to which full credit is to be given) is indicative of guilt.

Contrast the foregoing instruction with the prosecution's proposed instruction No. 10 (Tr. 324-325), given by the trial Court (Tr. 7874), Specification of Error No. 13(f), *supra*, pages 22-23. That instruction reads as follows:

"You should look to the interest which the respective witnesses have in the trial or in its results. Where the witness or witnesses has or have a direct personal interest in the result of the trial, the temptation is strong to color, pervert or withhold the fact. The law permits the defendant at his own request to testify in his own behalf. The defendants have availed themselves of this privilege. Their testimony is before you and you must determine how far it is credible. The deep personal interest they have in the result of the trial should be considered by the jury in weighing their evidence in determining how far or to what extent it is worthy of credit. The fact that one is a defendant does not condemn it as unworthy of belief, but at the same time it creates an interest greater than that of any other

witness, and to that extent affects the question of credibility.

“It is a familiar rule that the relations of a witness to the matter to be decided are legitimate subjects of consideration in respect to the weight to be given to his testimony.”

It was true that the defendants had a deep personal interest in the results of the trial, but how could the trial judge know *either as a matter of fact or as a matter of law* (and to warrant an instruction to that effect he must have known it as a matter of judicial knowledge) that the fact that the defendants were defendants *created* in them an interest *greater* than that of *any other* of the witnesses?

Thus the credibility of the witnesses for the prosecution was to be measured by *appearances of attempts* to tell the truth, whereas the credibility of the defendants was to be measured by their *deep and greater* personal interest in the outcome of the trial. The scales were not evenly balanced; they were heavily weighted against the defendants and in favor of the witnesses for the prosecution.

Nor is this the worst of it. The matter of credibility as opposed to non-credibility related, and related only, to probable truth-telling as opposed to probable falsification. If the defendants were innocent, they had no reason to falsify. It was only if they were guilty that they would have had reason to falsify. The fact that they were defendants did not make them guilty. The fact that they were defendants alone

did not "create" in them a "greater" reason or temptation to give false testimony than reasons and temptations which may have actuated the witnesses for the prosecution to give false testimony. Yet such was clearly and unmistakably the implication of the instruction given by the trial Court.

Indeed, that instruction, in practical effect, told the jury to assume that the defendants were guilty (that is, that they had reason and temptation to give false testimony) in determining "how far and to what extent" their testimony was "worthy of credit" and then, having assumed that they were guilty for the purpose of passing upon the credibility of their testimony, to decide whether they were in fact guilty. This completely negated the presumption of innocence. It clearly constituted prejudicial error.

III. INSTRUCTIONS RE DISCREPANCIES AND CONFLICTS.

The two instructions given by the trial Court on the subject of credibility of witnesses above discussed should be considered in connection with the following instruction given by the trial Court of its own volition (Tr. 7872-3) and set out in Specification of Error No. 13(e), *supra*, pages 21 and 22:

(e) If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness or between the testimony of any witnesses, or if you should find yourself disagreeing over various issues, real or apparent, you should then ascertain whether or not such dis-

crepancies or inconsistencies or such points of difference affect the true issue in this case. Examine such discrepancies or inconsistencies and such disputed points and ask yourselves these questions: How does the decision of this or that or the other discrepancy or other matter in dispute affect the guilt or innocence of the defendants? Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question: Did or did not the defendants commit that charges or acts as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendants? If they are not material, if the decision of the same is not necessary to enable you to arrive at the guilt or innocence of the defendants, then such discrepancy or disputed points are immaterial and minor matters, and you should waste no further time in discussing or considering them.

There was more than one "*true issue in this case.*" There were many true issues. And no discrepancy in the evidence *affected* the guilt or innocence of the defendants. And no discrepancy or disputed point was *material to establish* the guilt or innocence of the defendants. And there was no one "main or material issue of fact." There were many main and material issues of fact. And the decision of no single discrepancy in the evidence and of no single disputed point was "*necessary*" to enable the jury to arrive at the guilt or innocence of the defendants. Only by considering and resolving all or at least most of the dis-

crepancies or disputed points in the record could the jury arrive at a fair conclusion concerning the guilt or innocence of the defendants.

This instruction in practical effect told the jury to ignore all of the discrepancies in the testimony of the witnesses for the prosecution and to consider only so much of the testimony of such witnesses as pointed to the guilt or innocence of the defendants, even where parts of that testimony was inconsistent or in conflict with other testimony given by the same witness. As the testimony of such witnesses which remained after those discrepancies were cast aside either pointed to the guilt of the defendants or pointed neither toward the guilt nor the innocence of the defendants, this instruction in practical effect told the jury to consider only so much of the testimony of the witnesses for the prosecution as pointed in the direction of the guilt of the defendants and to ignore as immaterial all discrepancies which indicated that the witnesses for the prosecution were not credible witnesses.

This instruction in practical effect told the jury to ignore all conflicts in the evidence where it was not *necessary* to decide those conflicts one way or another to determine the question of the guilt or innocence of the defendants. As to the extent that such conflicts bore upon the question of the credibility of witnesses as distinguished from whether the allegations in the indictment were or were not true, this instruction told the jury to ignore as immaterial such conflicts in the evidence. Thus, all of the "Stockton witnesses"

produced by the defendants to establish that the testimony of the prosecution witnesses Crouch and Johnson relating to the presence of the defendant Bridges in New York City at a particular time was false in that the defendant Bridges was in the City of Stockton, California, at such time, was under this instruction to be disregarded as immaterial because the presence of Harry Bridges in the City of Stockton at the time in question would not prove or disprove the innocence or guilt of the defendants of the offenses charged against them in the indictment. Thus also under this instruction the testimony of all of the character witnesses produced by the defendants was to be disregarded as immaterial for the reason that a showing that the defendants were persons of good character would not either prove or disprove their guilt or innocence.

The effect of this instruction was to emasculate, to reduce to a shadow the case put on by the defendants, both by the introduction of testimony and other evidence, and by the development in cross-examination of discrepancies in the testimony of witnesses for the prosecution, including admissions by many of those witnesses that they had on previous occasions given false testimony under oath concerning the very things about which they were testifying to establish a case against the defendants. It even, in effect, told the jury to ignore the fact that the prosecution witness Ross admitted while on the witness stand that he had while testifying on direct examination given false

testimony concerning his name, parentage, place of birth, places of residence, occupations, and the like.

That such was the intended purpose of this instruction is made indisputably clear by the following statement made by the trial Court at the outset of his charge to the jury, namely:

“I trust that you may be able to perceive the truth shimmering like gold in the crucibles of this trial, in the searching light of legal principles applicable.” (R. 7864.)

and the corresponding statement by the trial Court following the return of the verdicts of guilty in congratulating the jury on those verdicts, viz.,

“You have finally found the golden truth shimmering in the fiery crucibles of this trial.” (R. 8038.)

In other words, in giving this instruction the trial Court told the jury that everything in the record, all discrepancies, all conflicts, which pointed away from the guilt of the defendants was dross, and that all that pointed in the direction of their guilt was pure gold.

IV. INSTRUCTIONS RE CONSPIRACY.

The trial Court committed prejudicial error in giving to the jury the prosecution's proposed instructions numbered 5 and 8. (Tr. 322-324, 7899 and 7900-1) set

out in Specification of Errors 13 (o) and (p), *supra*, pages 27-29.

To each of these instructions as proposed by the prosecution was appended a misleading citation. To proposed Instruction No. 5, the citation read as follows: “(United States v. Potash, et al., District Court for Southern District New York; affirmed as to four defendants, United States v. Potash, 118 F. (2d) 42 (C.C.A. 2); cert. den. United States v. Potash, 313 U.S. 584)”. The cited decision does not contain any indication that such an instruction was given. The only question raised as to the charge of the Court was that an instruction that certain persons were co-conspirators was not given. The briefs in that case disclose that no point was made of the giving of the instruction proposed by the prosecution in this case.

Appended to Instruction No. 8 as proposed was this citation: “(United States v. Braverman, et al., U. S. District Court for Eastern District of Michigan; aff. 125 F. (2d) 283; reversed on other grounds, viz., for re-sentencing of defendants, 317 U.S. 49)”. The cited decision does not directly support the statements made in the proposed instruction, and no instruction as proposed was reviewed in the recorded decision. This instruction was in fact given in that case (see the record in that case at pp. 642-3), but following a long and explicit instruction which rendered it harmless (see record in that case at pp. 623-643). Furthermore, the “common design” in that case, if there was a “common design”, had to be illegal.

The prosecution's proposed instruction No. 5 was prejudicially erroneous in that it discussed the matter of probabilities, and what persons usually do, and what conspirators rarely do. It in effect told the jury that they could convict the defendants of the conspiracy charged in the first count of the indictment on the basis of probabilities. The vice of the prosecution's proposed Instruction No. 8 consists in the opening sentence, viz., "I think I should further charge you that all persons working together in the furtherance of a common design are members of the conspiracy, although the part any one is to take is subordinate or is to be executed at a remote distance." This in practical effect told the jury that if the three defendants had a common design to obtain the naturalization of the defendant Bridges, they were guilty of the conspiracy charged in the first count of the indictment. It did not, however, tell them that in order to convict, the common design had to be to procure that naturalization by fraudulent means or by the giving of false testimony.

V. THE TRIAL COURT ERRED IN GIVING OF ITS OWN VOLITION THE FOLLOWING INSTRUCTION SET OUT IN SPECIFICATION OF ERROR 13(a), SUPRA, p. 19.

(a) In the issue of Mr. Bridges' asserted membership in the Communist Party, eleven witnesses have testified for the government: Messrs. Schomaker, Schrimpf, Hancock, Mrs. Harris, Mr. Krolek, Johnson, Crouch, Ross, Michener, Wil-

son and Rathborne. As opposed to the foregoing witnesses concerning the alleged membership in the Communist Party, Mr. Bridges, as well as the other defendants, the defendants have offered two witnesses other than themselves, that is, Bruce B. Jones and Mrs. Jean Murray. These, apart from the character witnesses offered by the defense. (Tr. 7864-7865.)

In this instruction Judge Harris adopted in substance the following argument made by the chief prosecutor in the prosecution's closing argument to the jury:

"I asked you this question at that time: Who said Harry Bridges was a member of the Communist Party? And I called off the roll: John Schomaker, Henry Schrimpf, Mrs. Irene Harris, Stanley Hancock, Charles Krolek, Paul Crouch, Manning Johnson, Lawrence Ross, Lewis Michener, Mervyn Rathborne and George Wilson.

And I asked you at that time: Who, on the other hand, has told you that Mr. Bridges was not a member of the Communist Party, who could have been in a position to know? And I call the roll as: Bruce B. Jones, Jean Murray and Harry Bridges.

Now, let me ask you the question: Who said Henry Schmidt was a member of the Communist Party? John Schomaker, Henry Schrimpf, Stanley Hancock, Mervyn Rathborne and George Wilson. And who said Henry Schmidt was not a member of the Communist Party? Henry Schmidt.

Who said J. R. Robertson was a member of the Communist Party? Mervyn Rathborne and

George Wilson. And who said J. R. Robertson was not a member of the Communist Party? J. R. Robertson." (Tr. 7843-4.)

By adopting that argument, Judge Harris himself made that argument and accentuated it.

The vice of such instruction is two-fold: First, because it conveyed to the jury the thought that they should decide the question of the guilt or innocence of the three defendants on the basis of the number of witnesses who gave testimony pertaining to whether the appellants were or were not members of the Communist Party. The second vice in this instruction is that although giving slight, and slighting, reference to the character witnesses offered by the defense, it completely ignored the fact that ten witnesses testified and produced documentary evidence in contradiction of the testimony given by the prosecution's witnesses Crouch and Johnson concerning the presence of appellant Bridges at the National Convention of the Communist Party in New York on June 26-27, 1936, by which testimony of Crouch and Johnson the prosecution attempted to establish that appellant Bridges, under the name of Harry Dorgan, was elected to high office in the Communist Party of the United States. Those witnesses were Walter W. Mahaffey, Mike Silk, Gerald McDonald, Louie Devonshire, James Shuffler, Frank J. Jaworski, Barth Woods, Kirk Clagstone, William Christianson, Aubrey F. Lee and John Sawyer.

Two of those witnesses, namely, Aubrey Lee and Kirk Clagstone, were complete strangers to appel-

lants. Aubrey Lee was married in Stockton, California, on June 27, 1936, and he testified concerning his marriage and the wedding party. Mr. Clagstone was an usher at that wedding and with other members of the wedding party attended a nightclub in the City of Stockton on the evening of June 27, 1936, at which Bridges and other members of Bridges' party were present.

Thus in this instruction by failing to mention the Stockton witnesses in relation to the issue of whether Bridges was or was not a member of the Communist Party, the trial judge told the jury to ignore the testimony given and the evidence produced by the witnesses in contradiction of the very damaging testimony given by the prosecution witnesses Crouch and Johnson, which were specially mentioned in this instruction.

VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING THE INSTRUCTION SET FORTH UNDER SPECIFICATION OF ERROR 13(c), SUPRA, pp. 20-21. (Tr. 7868.)

In effect it told the jury to give no consideration to the Supreme Court decision in the case of *Bridges v. Wixon* in relation to the testimony of appellants Schmidt and Robertson that they base their opinion that appellant Bridges was not a member and had not been a member of the Communist Party in part upon that decision.

VII. THE TRIAL COURT ERRED IN GIVING INSTRUCTIONS SET FORTH IN SPECIFICATION OF ERROR 13(i) AND (m), SUPRA, pp. 24 and 26-27. (Tr. 7880-1 and 7914.)

These instructions were error in that they materially misstated the elements of the offense charged against appellants Schmidt and Robertson in the third count of the indictment.

VIII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING THE INSTRUCTION SET FORTH UNDER SPECIFICATION OF ERROR 13(k), SUPRA, pp. 25-26. (Tr. 7887.)

It told the jury that the "crucial question" as to whether appellants Schmidt and Robertson were guilty of the offenses charged against them was whether they had any intent to deceive and defraud the Government of the United States and that the "asserted good faith, the intent, the purpose, and the motive" of the defendants Schmidt and Robertson "constituted *the* vital and important element of the case brought against them.", ignoring completely the fact that to be guilty of either of the offenses charged against them, they, in addition to having an intent to deceive or defraud the Government, and in addition to having not had good faith, etc., would have had to have done the things which they were charged with having done in counts 1 and 3 of the indictment. In other words, this instruction in effect told the jury that if appellants Schmidt and Robertson had a wrongful intent, they should be convicted of conspiracy even though they did not conspire, and that

if they had a wrongful intent they should be convicted of having aided and abetted appellant Bridges in obtaining naturalization even though they did nothing to encourage or aid the defendant Bridges to apply for, receive or obtain a certificate of naturalization.

IX. THE TRIAL COURT ERRED IN GIVING THE INSTRUCTION SET FORTH IN SPECIFICATION OF ERROR 13(1), SUPRA, p. 26. (Tr. 7895.)

Such an instruction is contrary to the decision of this Court in the case of *Luse v. United States*, 49 F.2d 241 (9 Cir., 1931).

POINT XI.

THE TRIAL COURT ERRED IN ITS ORDER REVOKING APPELLANT BRIDGES' NATURALIZATION.

(Specification of Error 21.)

I. PRELIMINARY.

After the conviction of appellant Bridges and after he had filed his notice of appeal, the Government moved the trial Court for an order revoking his citizenship. The trial Court made such an order (Tr. 8-12 of 12607) relying upon the provisions of 8 U.S.C.A. 738(e). The appeal from that order is now before this Court (Tr. 7-8, 12-13 of 12607) along with the appeal from the judgments of conviction.

Obviously upon a reversal of the judgments of conviction, the order revoking citizenship will have to fall.

However, since such an order has been filed with the clerk of the Court below, the mandate of this Court should direct a reversal of the order revoking citizenship as well. In addition to the fact that the order of revocation must fall because the conviction cannot stand for the reasons heretofore discussed in this brief, there are several independent considerations which demonstrate that the order of revocation is invalid. We consider these briefly.

Section 738(e) of Title 8 provides for revocation of the naturalization of a person who "shall be convicted under this chapter of knowingly procuring naturalization in violation of law". Subsection (e) is preceded by subsections (a) to (d), which provide a method for denaturalization without reference to criminal convictions. Such civil denaturalization proceedings may be brought by the Government upon the ground of fraud or illegal procurement of naturalization.

Thus the statutory scheme provides two methods for revoking citizenship: one, in an independent civil action; and the other, as ancillary to a criminal proceeding.

In determining the extent of the Court's power to proceed under Subsection (e), consideration must be given to the cases having to do with the Court's power under Subsections (a) to (d) since the two methods of procedure are so closely related, and since no case under Subsection (e) has, to our knowledge, reached an Appellate Court. These cases, furthermore, set a

background against which the action of the trial Court here under consideration may be judged.

In *Schneiderman v. United States*, 320 U.S. 118 (1943), the Government sought to cancel the defendant's naturalization upon the ground that he had illegally obtained citizenship. The illegality was alleged to consist of the fact that at the time of his naturalization he had not been attached to the principles of the Constitution. Despite the fact that the trial Court and this Court both sustained the Government, and in the face of the rule that the Supreme Court gives considerable weight to this Court's affirmation of a trial Court finding, the Supreme Court re-examined the record for itself and reversed the judgment below. This it did primarily because of the fundamental nature of the rights involved and out of a desire to make explicit the standard which had to be met before those rights could be abrogated.

“This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded

as the highest hope of civilized man.” (*Ibid.*, 320 U.S. at 122.)

This doctrine was reapplied, and the *Schneiderman* case was relied on, in *Baumgartner v. United States*, 322 U.S. 665 (1944), where the Supreme Court unanimously again reversed the findings of both the District Court and the Court of Appeals after its own independent examination of the record and its own evaluation of the evidence.

In *Knauer v. United States*, 328 U.S. 654 (1946), the Court said:

“Citizenship obtained through naturalization is not a second class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country ‘save that of eligibility to the Presidency.’ ” (*Ibid.*, 328 U.S. at 658.)

In addition to the fact that the rights here involved are of paramount importance, is the fact that these rights are imbedded in a judicial decree and that revocation is in effect a nullification of a valid subsisting decree. In the *Schneiderman* case, *supra*, the Court said:

“We are dealing here with a court decree entered after an opportunity to be heard. At the time petitioner secured his certificate of citizenship from the federal district court for the Southern District of California notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on (§6 of the Act of 1906), the hearing on the petition

was to take place in open court (§9), and the *United States had the right to appear, to cross-examine petitioner and his witnesses, to introduce evidence, and to oppose the petition* (§11). In acting upon the petition the district court exercised the judicial power conferred by Article III of the Constitution, and *the Government had the right to appeal from the decision granting naturalization.*" (*Ibid.*, 320 U.S. at 123.)

In the Bridges naturalization proceedings, Judge Foley also exercised his judicial power and the Government not only had the rights adverted to above, but exercised most of them; since it did not avail itself of its right to appeal from the order admitting to citizenship, that order had long since become final.

Because of the nature of the rights involved in a grant of citizenship and the solemnity and dignity which attach to the decree of naturalization, the Supreme Court has held that the rights cannot be destroyed or the decree voided except by meeting a most rigid standard of proof. In both the *Schneiderman* and *Baumgartner* cases, *supra*, it took the extraordinary step of reversing a Circuit Court's affirmance of a District Court decree in favor of the Government, because it was not satisfied with the evidence offered—a matter usually regarded as within the discretion of the trial Court.

It did this because, as it said in the *Schneiderman* case:

"* * * rights once conferred should not be lightly revoked. And more especially is this true when

the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted.” (*Ibid.*, 320 U.S. at 125.)

A last case to be considered here establishes that rigid procedural requirements must be met before citizenship can be revoked.

In *Klapprott v. United States*, 335 U.S. 601 (1949), after the statutory time to answer had expired, the default of the defendant was entered and his naturalization revoked. The defendant subsequently moved to set aside the default. The trial Court dismissed his petition and the Circuit Court affirmed its order. The Supreme Court reversed both lower tribunals and ordered the default set aside.

“Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. Persons charged with crime in United States courts cannot be convicted on default judgments unsupported by proof. Even decrees of divorce or default judgments for money damages where there is any uncertainty as to the amount must ordinarily be supported by actual proof. The reasons for requirement of proof in cases involving money apply with much greater force to cases which involve forfeiture of citizenship and subsequent deportation. This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 U.S.C. §719, 8 U.S.C.A. §719. As

a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen obviously deprives him of liberty * * *. It may result also in loss of both property and life, or of all that makes life worth living.' *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.

*"Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt * * * it is our opinion that courts should not in §738 proceedings deprive a person of his citizenship until the Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance."* (*Ibid.*, 335 U.S. at 611-615.)

Justices Murphy and Rutledge joined in the opinion of the majority of the Court and furthermore said:

"To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to

our law and at most but doubtfully within Congress' power. U.S. Const. Amend. VIII." (*Ibid.*, 335 U.S. at 616-617.)

From all of the foregoing, the following emerges:

(a) The naturalized citizen obtains as a result of his naturalization exactly the same rights, benefits, privileges and immunities as a native-born citizen has (with the exception of his eligibility to the Presidency)—rights subject to the most careful protection by the Court.

(b) Naturalization, which confers such rights, benefits, privileges and immunities upon an alien, is a solemn judicial act of a competent tribunal and entitled to all the respect usually accorded to such acts.

(c) In the case at bar the Government had the right to oppose or to appeal from the decree granting citizenship to Bridges and its failure to do so rendered the judgment of the Superior Court a final and conclusive adjudication of the citizenship rights of Bridges.

(d) The rights which Bridges thus acquired and the solemn judgment which gave him those rights cannot be destroyed by the Government except by clear, convincing and overwhelming proof; they cannot be destroyed by default and any effort to destroy them must be scrutinized by this Court with the greatest of care.

It is true that the foregoing cases are civil denaturalization proceedings but it does not follow that

the conclusions drawn have no application to the case at bar. On the contrary, the language of the Court in these various opinions makes it clear that it is speaking generally of the nature of the rights granted by a decree of naturalization and that it is concerned with the effort to revoke, cancel or destroy those rights and to set aside such a solemn decree, irrespective of the particular form which that effort takes. We submit that the same criteria apply in the present case despite the fact that the trial Court presumably acted under Subsection (e) of 8 U.S.C.A. 738 rather than under Subsections (a) to (d) of that section.

II. 8 U.S.C.A. 738(e) HAS NO APPLICATION TO THIS CASE.

The trial Court, in what amounted to an *ex parte* proceeding, without affording Bridges an opportunity to present any testimony on the issue and without itself adducing any evidence upon which any finding could be based, set aside and cancelled the judicial decree of a California Court granting basic citizenship rights to Bridges.

It did this upon the basis of 8 U.S.C.A. 738(e), which reads as follows:

“When a person shall be convicted under this chapter of knowingly procuring naturalization in violation of law, the court in which such conviction it had shall thereupon revoke, set aside, and declare void the final order admitting such per-

son to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

The difficulty with the Court's order is that the case before it did not fall within the provisions of §738(e). In order to satisfy §738(e) there must be at least three conditions met:

- (a) The person must have been "convicted".
- (b) He must have been convicted "under this chapter".
- (c) He must have been convicted thereunder of "knowingly procuring naturalization in violation of law".

Not a single one of these requirements was met in this case. Since the statute requires that all three be met, the failure to meet *any one*, particularly in the light of the preliminary observations made above, requires a reversal of the order here under consideration.

1. There had been no "conviction" at the time the order of revocation was entered.

Whatever may be the popular conception of the meaning of the word "conviction", in its legal significance it means a final, binding and conclusive judgment. (13 C. J. 909, 16 C. J. 1267.) Until the judgment is final, there is no conviction.

In *Dial v. Commonwealth*, 142 Ky. 32 (1911) (involving the competency of a witness), the Court said:

“The word ‘conviction’ has a twofold meaning. One is the determination of the fact of guilt, as by the verdict of a jury * * * or by confession * * * The other, and the one in which it is employed in speaking of a state of infamy, denotes the *final* judgment in the prosecution.” (*Ibid.*, 142 Ky. at 33-34.)

In *Commonwealth v. Kiley*, 150 Mass. 325 (1889) (involving the forfeiture of a liquor license), the Court said:

“Nothing less than a *final* judgment conclusively establishing guilt will satisfy the meaning of the word ‘conviction’ as here used.” (*Ibid.*, 150 Mass. at 326.)

To the same effect see *Thompson v. United States*, 30 App. D.C. 352 (1908) (credibility of a witness); *Commonwealth v. McDermott*, 224 Pa. 363 (1909) (prior conviction statute); *People v. Fabian*, 192 N.Y. 443 (1908) (disenfranchisement after “conviction”); *People v. Schaller*, 224 App. Div. 3 (1928) (prior conviction statute); *State v. Savage*, 86 W. Va. 655 (1920) (same).

Thus wherever the status or rights of an individual are at stake and it is sought to destroy that status or deprive him of those rights, the Courts have insisted upon *finality of judgment* as a condition precedent to such action. This must be particularly so in a case where the status and rights involved have been de-

clared by the Supreme Court to enjoy the highest kind of protection and where they have been established by a final decree of a Court of competent jurisdiction.

There was here no *final* judgment since the entire question of guilt or innocence was still at large because of the pendency of the appeal from the "conviction". It has been universally held that the pendency of an appeal deprives the judgment of the finality necessary as a condition precedent before disabilities such as are here involved—or even disabilities of a lesser nature—can attach.

In *Staniforth v. State*, 24 Ohio App. 208 (1927), the question was whether there could be a trial under a "second offense statute" while proceedings with respect to the first offense were pending and undecided before an Appellate Court. The defendant had been charged, tried and found guilty; and judgment had been entered. *The defendant was in the course of prosecuting an appeal from that judgment when he committed the second offense.* The Ohio Court held that there had not been a prior "conviction", saying:

"* * * it is our judgment that before one can be charged with a second offense the first proceeding must have resulted *finally* in sustaining the conviction, as otherwise a discharge acquitting the defendant would wipe out the legal character of the charge known as the first offense, and consequently under such legal status, there could be no second offense * * * A logical analysis of the question raised forces but one conclusion, which is that there must be a *final* adjudication of the

first offense before it can be decided that there is a second offense * * *'' (*Ibid.*, 24 Ohio App. at 209-210.)

The Court emphasized that when a "conviction" is made the ground of *some disability or special penalty over and above that normally imposed for the commission of the crime*, there must of necessity be a "final adjudication" and such a situation arises only when "the judgment thereon [has] become final."

In *Arbuckle v. State*, 132 Tex. Crim. Rep. 371 (1937), the same problem was presented and the same conclusion was reached, the Court saying:

"Before a prior conviction may be relied on to enhance the punishment in a subsequent case such prior conviction must be *final*. If an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court. It is not necessary to discuss at length the two foregoing propositions or to cite authorities to support them. They are too well established by our own decisions, as well as those from other jurisdictions, to consume time or space further than to state them, and they will be referred to later only incidentally." (*Ibid.*, 132 Tex. Crim. Rep. at 372-3.)

In *Joyner v. State*, 158 Fla. 806 (1947), the same conclusion was reached upon a record which showed that the judgment of conviction for the alleged first offense was pending on appeal at the time the alleged second offense was committed.

“It appears very well settled that before a prior conviction may be relied upon to enhance the punishment in a subsequent case such prior conviction must be *final*. If an appeal has been taken from a judgment of guilty in the trial court *that conviction does not become final* until the judgment of the lower court has been affirmed by the appellate court.” (*Ibid.*, 158 Fla. at 808.)

In the cases just discussed, there was involved the imposition of an added penalty—usually a longer prison term—because of the alleged existence of a prior “conviction”. Certainly if in cases of that character the Courts insist upon an appellate affirmance before attaching to the prior conviction the finality required by law, this Court can do no less in the case at bar.

Apart from the provisions of 8 U.S.C.A. 738(e), the penalty to which Bridges was liable as a result of his “conviction” is fixed by the Criminal Code of the United States and had already been imposed by the trial Court. Based upon 8 U.S.C.A. 738(e) the Government sought and the Court imposed an *added penalty* which is not found in the Criminal Code. It was a penalty which could seriously affect Bridges’ citizenship rights and status pending his appeal and which would vacate a solemn judicial decree made by a Court of coordinate jurisdiction. The Supreme Court of the United States has pointed out the safeguards which surround a defendant in such a situation, and certainly they are greater than those which protect against liability for merely added punish-

ment. Certainly if "conviction" in the cases just considered means a final, post-appellate adjudication, it can mean no less here.

To conclude this phase of the matter we quote from *Mariano v. Judge of District Court*, 243 Mass. 90 (1922), where the Court said:

"Conviction ordinarily means a conclusive establishment of guilt. It imports that the question of guilt has been adjudicated and *is not open to further inquiry as of right* by the person convicted." (*Ibid.*, 243 Mass. at 92.)

And from *In re Phillips*, 17 Cal.2d 55 (1941), where the Court said:

"An order granting a new trial or *a reversal of the judgment of conviction* is based upon the premise that error was committed which renders it uncertain whether the defendant is actually guilty of the crime of which he was convicted. (See 8 Cal. Jur. 414, 489.) *So long as such action can be taken, it is clear that the judgment of conviction is not final* because it is still possible that an ultimate determination on the merits will find the defendant not guilty." (*Ibid.*, 17 Cal.2d at 60.)¹

Here, of course, the question of guilt had not been so finally adjudicated where the trial Court made its order of revocation—and has not yet been so adjudicated. Under the federal statutes the question of guilt *was open to further inquiry as of right by Bridges*;

¹To the same effect see the cases collected in 113 A.L.R. 1181.

and as the records of this Court show, he availed himself of that right by prosecuting an appeal from the judgment of the trial Court. Consequently it cannot be said that he had been "convicted" in the sense in which that term must be understood as used in 8 U.S.C.A. 738(e).

2. **There was no conviction under the chapter referred to in 8 U.S.C.A. 738(e).**

Bridges was not convicted under any law contained in "this chapter" as required by 8 U.S.C.A. 738(e). "This chapter" clearly refers to Chapter 11 of Title 8. That is the chapter in which 738(e) is to be found.

Bridges was tried under two counts of an indictment:

The first count was a general conspiracy count and was based upon a section in the *old Title 18* which was later carried over into the *new Title 18*. Clearly a conviction on that count was not a conviction under Chapter 11, or any chapter, of Title 8.

The second count of the indictment under which Bridges was convicted *is laid not under any section of Chapter 11 of Title 8* but according to the Government's designation in the indictment is laid under a section of the *new Title 18*, to-wit, § 1015(1). This section, according to the Government's caption of the second count of the indictment, derives from § 746(1). However, at the time the indictment was returned on May 25, 1949, and at the time the judgment of conviction was entered on April 10, 1950, § 746(a)(1) of

Title 8 had long since been repealed.² Thus when § 738(e) speaks of the conviction of a crime “under this chapter” as a prerequisite for the order appealed from here, and when the section “under this chapter” upon which the indictment was based, had been repealed effective nine months prior to the return of the indictment and almost two years prior to the trial Court’s judgment, it is clear that there was no conviction “*under this chapter*”.

It is true that at the time of the repeal of the penal provisions of § 746 of Title 8, many of them were re-enacted into the new Criminal Code (*Title 18*) at various points. However, certainly such a repeal and re-enactment removed them from being “under this chapter” as required by § 738(e). It is preposterous to say that a conviction under a section of *Title 18* of the United States Code is equivalent to a conviction under a chapter of *Title 8* of the United States Code.

3. Bridges was not convicted of “knowingly” procuring naturalization in violation of law.

The third requirement of § 738(e) has not been met. § 738(e) is a very carefully drafted statute. It does *not* provide that upon conviction for *any* violation of the Nationality Code the citizenship of a naturalized citizen may be revoked.³ On the contrary,

²*Act of June 25, 1948, Chap. 645, §21, 62 Stat. 692, effective September 1, 1948.*

³It may be arguable that the broader language of Subsections (a) to (d) of §738 have this effect. However that, too, is doubtful in view of the *Schneiderman, Baumgartner, Knauer* and *Klapprott* cases, *supra*. In any case, that problem is not now before the Court.

it provides that such revocation shall occur only upon conviction for "knowingly procuring naturalization in violation of law." The quoted words are clearly words of limitation and, bearing in mind the standards established in the denaturalization cases, those words must be liberally applied in favor of the naturalized citizen. If the Congress had intended to authorize revocation of citizenship for *any* violation of the nationality laws, it would not have had occasion to insert these words of limitation in § 738(e), and § 738(e) could readily have read: "When a person shall be convicted under this chapter, the court in which such conviction is had shall thereupon revoke, etc." But the Congress limited the power to revoke citizenship to a conviction for "knowingly procuring naturalization in violation of law."

Bridges was not convicted of knowingly procuring naturalization in violation of law, he was not even charged with such an offense. He was charged in the first count with conspiracy, which is admittedly a separate and distinct offense from the substantive offense charged and which, as we have pointed out, arises and always arose under *Title 18*, the general criminal law, and never arose under any section of any chapter of *Title 8*; and he was charged in the second count with *false swearing in a naturalization proceeding*. The charge in the second count and the guilt or innocence of Bridges on that count *in no wise depended upon the fact of his procuring naturalization*.

It is clear that the offense to which § 738(e) refers and the offense involved here are two separate and distinct offenses. The first one, that of knowingly procuring citizenship in violation of law, is now to be found in 18 U.S.C.A. 1425. The second one, that of false swearing in a naturalization proceeding, is now to be found in 18 U.S.C.A. 1015(a).

The offense of *knowingly procuring naturalization in violation of law* is found in Chapter 69 of Title 18, a chapter dealing exclusively with matters relating to nationality and citizenship. The offense of *false swearing in a naturalization proceeding* is found in Chapter 47 of Title 18, a chapter dealing generally with false swearing and fraudulent statements and not specifically with naturalization or nationality matters. It is clear that the offense of which 8 U.S.C.A. 738(e) speaks and the offense involved in the second count of the Bridges indictment are *two separate and distinct offenses* and are found in two separate and distinct sections of the present Criminal Code—a code which was in effect during all stages of the proceeding below.

Not only are these two sections separate and distinct sections of the present Criminal Code at the present time, but throughout their entire history they have been separate and distinct, and the added punishment of automatic revocation of citizenship has always applied *only to the offense of knowingly procuring naturalization in violation of law* and not to the *separate and distinct offense of false swearing* in a natur-

alization proceeding. This was true even when the two sections were part of the same nationality code or the same nationality statute.

These offenses first appear in the *Naturalization Act of March 3, 1903* (57th Congress, 2d Session, Chapter 1012) (32 Stat. 1213). § 39 of that Act (32 Stat. 1222) provided as follows:

First:

“Any person who procures naturalization in violation of the provisions of this section shall be fined * * * and imprisoned * * * *and* the court in which such conviction is had shall thereupon adjudge and declare the order or decree and all certificates admitting such person to citizenship null and void.”

Second:

“Any person who * * * in any naturalization proceeding procures or gives false testimony as to any material fact shall be fined * * * and imprisoned * * *”

Thus in the 1903 statute Congress imposed the added penalty of revocation of citizenship only when a person is found guilty of procuring naturalization in violation of law. *It did not impose that penalty where a person was found guilty of false swearing.*

This distinction was retained in the *Act of June 29, 1906* (59th Congress, Chap. 3592) (34 Stat. 596), an *Act to Provide for a Uniform Rule for the Naturalization of Aliens throughout the United States*. § 23 of that Act (34 Stat. 603) provided as follows:

First:

“* * * Any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined * * * and imprisoned * * * and upon conviction the court in which said conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void.”

Second:

“* * * Any person who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact shall be fined * * * and imprisoned * * *”

Here again the penalty of revocation of citizenship, over and above the penalty of fine and imprisonment, was imposed only in cases where a conviction was had for knowingly procuring citizenship in violation of law. *It was not imposed for the offense of knowingly giving false testimony.*

This distinction was carried into the *Nationality Code of 1940*, 8 U.S.C.A. 746, where the two crimes we are considering appear as *separate and distinct* subsections of Subsection (a). Subsection (a) of 8 U.S.C.A. 746 reads as follows:

“It is hereby made a felony for any * * * person * * *”

First:

“(1) knowingly to make a false statement under oath * * * in any case * * * relating to * * * naturalization or citizenship; * * *”

Second:

“(2) knowingly to procure * * * the naturalization of any * * * person, contrary to the provisions of any law.”

So again we see that the two offenses we have been considering are separate and distinct, and it is clear from a reading of § 738(e) that the trial Court's authority to revoke that citizenship is limited to convictions for “knowingly procuring naturalization in violation of law” and that it had no authority automatically to revoke citizenship in the event of a “conviction” for “false swearing”.

CONCLUSION.

For all of the foregoing reasons together, and for each one of them taken independently, the judgments of conviction and order of revocation cannot stand. The judgments appealed from should and must be reversed.

Dated, San Francisco, California,

July 16, 1951.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

NORMAN LEONARD,

VINCENT W. HALLINAN,

JAMES MARTIN MACINNIS,

Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

House of Representatives Report No. 2051
77th Congress, 2d Session

SUSPENDING STATUTE OF LIMITATIONS FOR FRAUDS AGAINST THE UNITED STATES

April 27, 1942.—Referred to the House Calendar and
ordered to be printed.

Mr. McLaughlin, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 6484)

The Committee on the Judiciary, to whom was referred the bill (H. R. 6484) to suspend during the present war the running of statutes of limitations applicable to certain offenses, after careful consideration, report the bill favorably to the House with the recommendation that it do pass.

The purpose of the proposed legislation is to suspend any existing statute of limitation applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-con-

trolled corporations, and frauds against all of these agencies are intended to be embraced by the bill.

During the World War many frauds committed against the Government were not discovered until the 3-year statute of limitations had almost expired, and as stated in the committee report hereinafter referred to, many of the alleged offenses were barred from prosecution. The general criminal statute of limitations (Rev. Stats., sec. 1044) was amended on November 17, 1921, extending the period to 6 years in respect to offenses involving frauds against the United States (42 Stat. 220, U. S. C., title 18, sec. 582). This provision was repealed by the act of December 27, 1927 (45 Stat. 51).

In connection with the World War legislation of this character the committee report (H. Rept. 365, 67th Cong.) stated the following:

The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require the most minute investigation in order to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the

Department may know whether prosecutions are justified or not. In many cases months, and perhaps considerable longer periods, will be required for such investigations.

Under the existing statute of limitations, above quoted, many of these alleged crimes are already barred, and in all such cases under the law no prosecutions can be had if any might be thought advisable. * * *

During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute

so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under the stress of present-day events, for the protection of those who would defraud or attempt to defraud the United States.

The proposed measure has been cleared with the Legislative Committee of the Department of Justice and with the Bureau of the Budget.

Calender No. 1593

Senate Report No. 1544, 77th Congress, 2d Session

SUSPENDING DURING THE PRESENT WAR THE RUNNING OF
THE STATUTE OF LIMITATIONS APPLICABLE TO CERTAIN
OFFENSES.

July 13, 1942.—Ordered to be printed.

Mr. Burton, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 6484)

The Committee on the Judiciary, to whom was referred the bill (H. R. 6484) to suspend during the present war the running of the statutes of limitations applicable to certain offenses, having considered the same, report the bill favorably to the Senate, with an

amendment, with the recommendation that the bill, as amended, do pass. The amendment follows:

Page 1 line 7, strike out all after the word "suspended", and in line 8, strike out the following: "of the present war and for six months thereafter.", and insert in lieu thereof, "until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate."

The purpose of the proposed legislation is to suspend any existing statutes of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, and frauds against all of these agencies are intended to be embraced by the bill.

During the World War many frauds committed against the Government were not discovered until the 3-year statute of limitations had almost expired, and as stated in the committee report hereinafter referred to, many of the alleged offenses were barred from prosecution. The general criminal statute of limitations (Rev. Stats., sec. 1044) was amended on November 17, 1921, extending the period to 6 years in respect to offenses involving frauds against the United States (42 Stat. 220, U. S. C., title 18, sec. 582). This provision was repealed by the act of December 27, 1927 (45 Stat. 51).

In connection with the World War legislation of this character the committee report (H. Rept. 365, 67th Cong.), stated the following:

The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require the most minute investigation in order to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the Department may know whether prosecutions are justified or not. In many cases months, and perhaps considerably longer periods, will be required for such investigations.

Under the existing statute of limitations, above quoted, many of these alleged crimes are already barred, and in all such cases under the law no prosecutions can be had if any might be thought advisable. * * *

During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being ex-

pended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of the present-day events, for the protection of those who would defraud or attempt to defraud the United States.

The proposed measure has been cleared with the legislative committee of the Department of Justice and with the Bureau of the Budget.

